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WHAT: Free public briefings (approximately 3 hours) to present:

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4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, August 12, 2008
9:00 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741-6008

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 73, No. 147
Wednesday, July 30, 2008

FARM CREDIT ADMINISTRATION

12 CFR Part 652

RIN 3052–AC36

Federal Agricultural Mortgage Corporation Funding and Fiscal Affairs; Risk-Based Capital Requirements; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA or Agency), through the FCA Board (Board), issued a final rule under part 652 on June 5, 2008 (73 FR 31937) amending our capital regulations governing the Federal Agricultural Mortgage Corporation. In accordance with 12 U.S.C. 2252, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is July 25, 2008.

DATES: *Effective Date:* The regulation amending 12 CFR part 652 published on June 5, 2008 (73 FR 31937) is effective July 25, 2008.

FOR FURTHER INFORMATION CONTACT:

Joseph T. Connor, Associate Director for Policy and Analysis, Office of Secondary Market Oversight, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4280, TTY (703) 883–4434, or

Rebecca S. Orlich, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4420, TTY (703) 883–4020.

(12 U.S.C. 2252(a)(9) and (10))

Dated: July 25, 2008.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. E8–17462 Filed 7–29–08; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0042; Directorate Identifier 2007–SW–26–AD; Amendment 39–15614; AD 2008–15–02]

RIN 2120–AA64

Airworthiness Directives; Eurocopter Deutschland GMBH Model MBB–BK 117C–2 Helicopters

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Eurocopter Deutschland GMBH (Eurocopter) Model MBB–BK 117C–2 helicopters. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The European Aviation Safety Agency for the Republic of Germany, with which we have a bilateral agreement, states in the MCAI:

> During inadvertent operation of the fire extinguishing system, in one case it occurred that one of the two injection tubes became disconnected. This condition, if not corrected, could affect the ability of the fire extinguishing system to perform its intended function in the case of activation.

The inability of the fire extinguishing system to suppress an engine fire creates an unsafe condition. We are issuing this AD to correct the unsafe condition by further securing the injection tubes with improved clamps, allowing suppression of a contained engine fire, and subsequent loss of the helicopter.

DATES: This AD becomes effective on September 3, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 3, 2008.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590.

You can get the service information identified in this AD from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527.

FOR FURTHER INFORMATION CONTACT: John Strasburger, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5167, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on January 23, 2008 (73 FR 3885). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> During inadvertent operation of the fire extinguishing system, in one case it occurred that one of the two injection tubes became disconnected. This condition, if not corrected, could affect the ability of the fire extinguishing system to perform its intended function in the case of activation.

The inability of the fire extinguishing system to suppress an engine fire creates an unsafe condition. The proposed actions are intended to address this unsafe condition by further securing the injection tubes with improved clamps, allowing suppression of a contained engine fire, and preventing an uncontained engine fire and subsequent loss of the helicopter.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. However, we did change ''flight hours'' referred to in the MCAI to ''hours time-in-service'' in our AD. In making this change, we do not intend to differ substantively from the information provided in the MCAI. This difference is highlighted in the ''Differences Between the FAA AD and the MCAI'' section in this AD.

Costs of Compliance

We estimate that this AD will affect 26 helicopters of U.S. registry. We also estimate that it will take about 3.5 work-hours per helicopter to replace the clamps on the injection tubes. The average labor rate is $80 per work-hour. Required parts will cost about $20 per helicopter. Based on these figures, we estimate the cost of this AD to U.S. operators to be $7,800 or $300 per helicopter.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the economic evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2008–15–02 Eurocopter Deutschland: Amendment 39–15614. Docket No. FAA–2008–0042; Directorate Identifier 2007–SW–26–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective on September 3, 2008.

Other Affected ADs

(b) None.

Applicability

(c) This AD applies to Model MBB–BK 117C–2 helicopters, Serial Number (S/N) 9004 through S/N 9104, and S/N 9106, 9107, and 9111, with a fire extinguishing system B26K1002–801, B262K1003–801, or B262K1004–801, installed, certificated in any category.

Reason

(d) The mandatory continuing airworthiness information (MCAI) states:

During inadvertent operation of the fire extinguishing system, in one case it occurred that one of the two injection tubes became disconnected. This condition, if not corrected, could affect the ability of the fire extinguishing system to perform its intended function in the case of activation.

The inability of the fire extinguishing system to suppress an engine fire creates an unsafe condition. The proposed actions are intended to address this unsafe condition by further securing the injection tubes with improved clamps, allowing suppression of a contained engine fire, and preventing an uncontained engine fire and subsequent loss of the helicopter.

Actions and Compliance

(e) At the next 100 hours time-in-service inspection, unless already done, replace the current injection tube clamps by installing GBS clamps, part number GBSM24/18W4SK, by following the Accomplishment Instructions, paragraph A., and Figure 1 of Eurocopter Alert Service Bulletin MBB BK117 C–2–26A–001, dated January 22, 2007.

Differences Between the FAA AD and the MCAI

(f) The FAA refers to the compliance time by hours time-in-service rather than flight hours as referred to in the MCAI.

Subject

(g) Air Transport Association of America (ATA) Code JASC 262 Extinguishing System.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, Safety Management Group, Rotorcraft Directorate, FAA, has the authority to approve AMOCs for this AD, if requested, using the procedures found in 14 CFR 39.19. Send information to ATTN: John Strasburger, Aviation Safety Engineer, Fort Worth, Texas 76193–0111, telephone (817) 222–5167, fax (817) 222–5961.

(2) Airworthy Product: Use only FAA-approved corrective actions. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent) if the State of Design has an appropriate bilateral agreement with the United States. You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(i) MCAI Airworthiness Directive No. 2007–0121, dated May 3, 2007, contains related information.

Material Incorporated by Reference

(j) The Director of the Federal Register approved the incorporation by reference of Eurocopter Alert Service Bulletin MBB BK117 C–2–26A–001, dated January 22, 2007 under 5 U.S.C. 552(a) and 1 CFR part 51.

(k) For the service information identified in this AD, contact American Eurocopter Corporation, 2701 Forum Drive, Grand

Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527.

(l) You may review copies of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Fort Worth, Texas, on May 5, 2008.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. E8–17265 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0287; Directorate Identifier 2006–SW–15–AD; Amendment 39–15615; AD 2008–15–03]

RIN 2120–AA64

Airworthiness Directives; MD Helicopters, Inc. Model 369A, OH–6A, 369D, 369E, 369F, 369FF, 369H, 369HE, 369HM, and 369HS Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for MD Helicopters, Inc. (MDHI) Model 369A, OH–6A, 369D, 369E, 369F, 369FF, 369H, 369HE, 369HM, and 369HS helicopters that requires repetitive tap inspections of each tail rotor (T/R) blade abrasion strip. This amendment is prompted by an incident in which an abrasion strip separated from a T/R blade. The actions specified by this AD are intended to prevent disbonding and subsequent separation of an abrasion strip from a T/R blade, which could result in vibration, loss of the T/R, and subsequent loss of control of the helicopter.

DATES: Effective September 3, 2008.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 3, 2008.

ADDRESSES: You may get the Helicopter Technology Company, LLC (HTC) service information identified in this AD from HTC, 12902 South Broadway, Los Angeles, California, 90061, telephone (310) 523–2750, fax (310) 523–2745, or on the Internet at *http://www.helicoptertech.com*. The service information referenced in Note 2 of this AD may be obtained from MD Helicopters Inc., Attn: Customer Support Division, 4555 E. McDowell Rd., Mail Stop M615, Mesa, Arizona 85215–9734, telephone (800) 388–3378, fax (480) 346–6813, or on the Internet at *http://www.mdhelicopters.com*.

Examining the Docket: You may examine the docket that contains this AD, any comments, and other information on the Internet at *http://www.regulations.gov* or at the Docket Operations office, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: John Cecil, Aviation Safety Engineer, FAA, Los Angeles Aircraft Certification Office, Airframe Branch, 3960 Paramount Blvd., Lakewood, California 90712–4137, telephone (562) 627–5228, fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend 14 CFR part 39 to include an AD for the specified model helicopters was published in the **Federal Register** on March 13, 2008 (73 FR 13515). That action proposed to require, within 25 hours time-in-service (TIS), and thereafter at intervals not to exceed 25 hours TIS, tap inspections of the upper and lower surfaces of each T/R blade abrasion strip using a coin (United States 25-cent piece or equivalent), or a small brass, mild steel, or aluminum hammer, to detect bonding voids that exceed 0.2 square inch in size with a minimum of 1.0 inch between voids, at least 75 percent of the bonded area of the abrasion strip being free from voids, and no voids at the edge of the abrasion strip. Also proposed was a terminating action of modifying each T/R blade in accordance with FAA-approved data by installing a titanium rivet in the tip of the outboard end of each T/R blade and painting a "T" on the root-end of the T/R blade.

We have reviewed the following service information:

• HTC Mandatory Service Bulletin Notice No. 3100–4R4, dated May 10, 2006, which describes procedures for periodic inspection of the abrasion strip-to-skin bond integrity on each T/R blade, and modifying each T/R blade by installing a titanium rivet, P/N 500P3124–13, in the tip of the T/R blade, and painting a "T" on the root-end of the T/R blade in accordance with applicable engineering drawings or standard repair instructions; and

• MD Helicopters Service Bulletin SB369D–203R1, SB369E–097R1, SB369F–082R1, and SB369H–246R1, dated January 23, 2006, which describes procedures for periodic inspections of the T/R abrasion strip-to-skin bond integrity and modification of the T/R blade by HTC to install a titanium rivet in the tip of the T/R blade.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposal or the FAA's determination of the cost to the public. The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

The FAA estimates that this AD will affect 718 helicopters of U.S. registry.

• If operators conduct the repetitive inspections required by this AD instead of modifying their T/R blades by installing a titanium rivet, the estimated costs per year is $229,760 per year, assuming:

• 24 inspections per year per helicopter (600 hours TIS per 25 hour TIS inspection),

• Labor of 5 minutes per T/R blade (10 minutes (1⁄6 hour) per helicopter), and

• An average labor rate of $80 per work hour.

• If operators elect to implement the terminating action by installing a titanium rivet in each T/R blade, the estimated total cost is $244,120, assuming:

• The cost of removing, reinstalling, and balancing the 2–T/R blade set for the entire fleet is $114,880, assuming that it takes 2 work hours per helicopter to perform these actions at an average labor rate of $80 per work hour, and

• The cost of installing the rivet in each T/R blade in the fleet is $129,240, which includes the cost of $10 per rivet ($20 per helicopter), 1 work hour per T/R blade (2 work hours per helicopter) to install a rivet, at an average labor rate of $80 per work hour.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this AD. See the AD docket to examine the economic evaluation.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2008–15–03 MD Helicopters, Inc. (MDHI): Amendment 39–15615. Docket No. FAA–2008–0287; Directorate Identifier 2006–SW–15–AD.

Applicability: Model 369A, OH–6A, 369D, 369E, 369F, 369FF, 369H, 369HE, 369HM, and 369HS, certificated in any category, with a tail rotor (T/R) blade installed as follows including all serial numbers and those T/R blades with an ''M'' or an ''I'' painted on the T/R blade root:

- Helicopter Technology Company, LLC (HTC) part number (P/N) 500P3100–101 and –103, or MDHI P/N 369D21640–501, –503, and –505.
- HTC P/N 500P3100–301 and –303, or MDHI P/N 369D21641–501, –503, and –505.
- HTC P/N 500P3300–501 and –503, or MDHI P/N 369D21643–501, –503, and –505.
- HTC P/N 500P3500–701 and –703, or MDHI P/N 369D21642–501, –503, and –505.

Note 1: An ''M'' or an ''I'' painted on the root of the T/R blade indicates compliance to an Alternate Method of Compliance (AMOC) to Emergency AD 2003–08–51 (Docket No. 2003–SW–17–AD, Amendment 39–13215, April 15, 2003), issued by the FAA, Los Angeles Aircraft Certification Office (LAACO) on June 13, 2003 to HTC. The AMOC addressed shot peening of the pitch horn of the T/R assembly.

Compliance: Required as indicated.

To prevent disbonding and subsequent separation of an abrasion strip from a T/R blade, which could result in vibration, loss of the T/R, and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 25 hours time-in-service (TIS), unless accomplished previously, and thereafter at intervals not to exceed 25 hours TIS, inspect the abrasion strip-to-skin bond integrity on each T/R blade using a tap test method in accordance with Part 1—Inspection, in Helicopter Technology Company, LLC (HTC) Mandatory Service Bulletin Notice No. 3100–4R4, dated May 10, 2006 (SB).

Note 2: MD Helicopters Service Bulletin SB369D–203R1, SB369E–097R1, SB369F–082R1, and SB369H–246R1, dated January 23, 2006, pertain to the subject of this AD.

(b) Modifying each T/R blade in accordance with FAA-approved data by installing a titanium rivet at the outboard end and painting the letter ''T'' on the root-end of the T/R blade to indicate the modification has been accomplished is considered a terminating action for the requirements of this AD.

(c) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Manager, Los Angeles Aircraft Certification Office, FAA, ATTN: John Cecil, Aviation Safety Engineer, 3960 Paramount Blvd., Lakewood, California 90712–4137, telephone (562) 627–5228, fax (562) 627–5210, for information about previously approved alternative methods of compliance.

(d) Special flight permits will not be issued.

(e) The inspection shall be done in accordance with the specified portions of Helicopter Technology Company, LLC (HTC) Mandatory Service Bulletin Notice No. 3100–4R4, dated May 10, 2006. The Director of the Federal Register approved this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from HTC, 12902 South Broadway, Los Angeles, California, 90061, telephone (310) 523–2750, fax (310) 523–2745, or on the Internet at *http://www.helicoptertech.com*. Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(f) This amendment becomes effective on September 3, 2008.

Issued in Fort Worth, Texas, on June 25, 2008.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. E8–17274 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0177; Directorate Identifier 2007–SW–19–AD; Amendment 39–15616; AD 2008–15–04]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Canada (BHTC) Model 430 Helicopters

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for BHTC Model 430 helicopters. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The aviation authority of Canada, with which we have a bilateral agreement, states in the MCAI: ''It has been determined that the existing rigging procedures for the tail rotor pitch change mechanism have to be changed due to possibility of parts interference.'' The cumulative effect of individual part tolerances resulting in the total assemblage of those parts being out of tolerance could result in the tail rotor yoke striking another part other than the flapping stop (parts interference) cited in the MCAI. Also, the misalignment of the tail rotor counterweight bellcrank may result in higher tail rotor pedal forces and a higher pilot workload after failure of the #1 hydraulic system. Both parts interference and the misaligned counterweight bellcrank create an unsafe condition. This AD require actions that are intended to address these unsafe conditions.

DATES: This AD becomes effective on September 3, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of September 3, 2008.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations office, U.S. Department of Transportation, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

You may get the service information identified in this AD from Bell Helicopter Textron Canada, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4, telephone (450) 437–2862 or (800) 363–8023, fax (450) 433–0272.

Examining the AD Docket: The AD docket contains the Notice of Proposed Rulemaking (NPRM), the economic evaluation, any comments received, and other information. The street address and operating hours for the Docket Operations office (telephone (800) 647–5227) are in the **ADDRESSES** section of this AD. Comments will be available in the AD docket shortly after they are received.

FOR FURTHER INFORMATION CONTACT: Tyrone Millard, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0111, telephone (817) 222–5439, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Discussion

We issued an NPRM to amend 14 CFR part 39 to include an AD that would apply to BHTC Model 430 helicopters, serial numbers 49001 through 49122, on November 2, 2007. That NPRM was published in the **Federal Register** on November 16, 2007 (72 FR 64540). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states: ''It has been determined that the existing rigging procedures for the tail rotor pitch change mechanism have to be changed due to possibility of parts interference.'' Because the cumulative effect of the tolerances on the various parts may result in the total assemblage outboard of the counterweight bellcrank being out of tolerance, the tail rotor yoke may contact the nut, part number (P/N) 222–012–731–001, before contacting the flapping stop, resulting in less tail rotor travel. Additionally, the manufacturer has indicated that the tail rotor counterweight bellcranks may be misaligned, resulting in higher tail rotor pedal forces and higher pilot workload after failure of the #1 hydraulic system. Both the parts interference and the higher pedal forces constitute unsafe conditions. You may obtain further information by examining the MCAI and any related service information in the AD docket.

Comments

By publishing the NPRM, we gave the public an opportunity to participate in developing this AD. However, we received no comment on the NPRM or on our determination of the cost to the public. Therefore, based on our review and evaluation of the available data, we have determined that air safety and the public interest require adopting the AD as proposed.

Relevant Service Information

Bell Helicopter Textron has issued Alert Service Bulletin No. 430–07–39, dated January 9, 2007, that describes revised rigging procedures for the tail rotor pitch change mechanism. The actions described in the MCAI are intended to correct the same unsafe condition as that identified in the service information.

Differences Between This AD and the MCAI

We have reviewed the MCAI and related service information and, in general, agree with their substance. However, this AD requires compliance within the next 150 hours time-in-service or at the next annual inspection, whichever occurs first, instead of ''at the next 150 hour or annual inspection, but no later than 31 December 2007.'' In making this change, we do not intend to differ substantively from the information provided in the MCAI. This difference is highlighted in the ''Differences Between this AD and the MCAI'' section in the AD.

Costs of Compliance

We estimate that this AD will affect 58 helicopters of U.S. registry. We also estimate that it will take about 2 work-hours per helicopter to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. A replacement yoke will cost about $21,218, assuming the part is no longer under warranty. However, because the service information lists this part as covered under warranty, we have assumed that there will be no charge for this part. Therefore, as we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these assumptions and figures, we estimate the cost of this AD on U.S. operators to be $9,280, or $160 per helicopter.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Therefore, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2008–15–04 Bell Helicopter Textron Canada: Amendment 39–15616. Docket No. FAA–2007–0177; Directorate Identifier 2007–SW–19–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective on September 3, 2008.

Other Affected ADs

(b) None.

Applicability

(c) This AD applies to Model 430 helicopters, serial numbers 49001 through 49122, certificated in any category.

Reason

(d) The mandatory continuing airworthiness information (MCAI) states: ''It has been determined that the existing rigging procedures for the tail rotor pitch change mechanism have to be changed due to possibility of parts interference.''

This ''possibility of parts interference'' occurs because the cumulative effect of the tolerances on the various parts may result in the total assemblage outboard of the counterweight bellcrank being out of tolerance and the tail rotor yoke may contact the nut, part number (P/N) 222–012–731–001, before contacting the flapping stop. Further, the manufacturer has indicated that the tail rotor counterweight bellcranks may be misaligned, resulting in higher tail rotor pedal forces and higher pilot workload after failure of the #1 hydraulic system. Both the parts interference and the higher pedal forces constitute unsafe conditions. This AD requires actions that are intended to address these unsafe conditions.

Actions and Compliance

(e) Within the next 150 hours time-in-service (TIS) or at the next annual inspection, whichever occurs first, unless already accomplished, do the following:

(1) Adjust the rigging of the tail rotor pitch change mechanism in accordance with the Accomplishment Instructions, paragraphs 1 and 2, in Bell Helicopter Textron Alert Service Bulletin 430–07–39, dated January 9, 2007 (ASB).

(2) If either at full left pedal position or full right pedal position a gap exists between the tail rotor yoke and the flapping stop, replace the tail rotor yoke with an airworthy tail rotor yoke.

(3) If no gap exists between the tail rotor yoke and the flapping stop at either full right or full left pedal position, measure the gap between the tail rotor yoke and nut, P/N 222–012–731–001, adjust the tail rotor pitch change mechanism, and adjust the tail rotor pedal forces in accordance with the Accomplishment Instruction, paragraphs 4 through 6 of the ASB.

Differences Between This AD and the MCAI

(f) This AD differs from the MCAI in that it requires compliance within the next 150 hours TIS or at the next annual inspection, whichever occurs first, instead of ''at the next 150 hour or annual inspection, but no later than 31 December 2007.''

Other Information

(g) Alternative Methods of Compliance (AMOCs): The Manager, Safety Management Group, FAA, ATTN: Tyrone Millard, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193–0111, telephone (817) 222–5439, fax (817) 222–5961 has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(h) MCAI Transport Canada Airworthiness Directive No. CF–2007–04, dated April 5, 2007, contains related information.

Air Transport Association of America (ATA) Tracking Code

(i) ATA Code JASC 6720: Tail Rotor Control System, Tail Rotor Pitch Change.

Material Incorporated by Reference

(j) You must use the specified portions of Bell Helicopter Textron Alert Service Bulletin No. 430–07–39, dated January 9, 2007, to do the actions required.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bell Helicopter Textron Canada, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4, telephone (450) 437–2862 or (800) 363–8023, fax (450) 433–0272.

(3) You may review copies at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Fort Worth, Texas, 76193; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Fort Worth, Texas, on July 9, 2008.

Mark R. Schilling,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. E8–17275 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0353; Directorate Identifier 2007–CE–101–AD; Amendment 39–15620; AD 2008–16–02]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Corporation Model 390 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Hawker Beechcraft Corporation Model 390 airplanes. This AD requires you to repetitively do a post-flight check (owner/operator holding at least a private pilot certificate checking for residual heat in the angle-of-attack (AOA) probes or an appropriately-rated mechanic doing a maintenance manual operational test of the heat of the AOA probes) after every flight and replace or modify (upload software) the stall warning AOA transmitters. This AD results from reports of the potential for unannunciated loss of the heating function in the left-hand (LH) and right-hand (RH) stall warning AOA transmitters of Model 390 airplanes. We are issuing this AD to correct potentially inadequate stall warning with loss of stick pusher function.

DATES: This AD becomes effective on September 3, 2008.

On September 3, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: For service information identified in this AD, contact Hawker Beechcraft Corporation, 9709 East Central, Wichita, Kansas 67291; telephone: (800) 429–5372 or (316) 676–3140.

To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov*. The docket number is FAA–2008–0353; Directorate Identifier 2007–CE–101–AD.

FOR FURTHER INFORMATION CONTACT: Philip Petty, Aerospace Engineer, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4139; fax: (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

On March 19, 2008, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Hawker Beechcraft Corporation Model 390 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on March 25, 2008 (73 FR 15678). The NPRM proposed to require you to repetitively do a post-flight check (owner/operator holding at least a private pilot certificate checking for residual heat in the angle-of-attack (AOA) probes or an appropriately-rated mechanic doing a maintenance manual operational test of the heat of the AOA probes) after every flight and replace or modify (upload software) the stall warning AOA transmitters.

Comments

We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD affects 152 airplanes in the U.S. registry.

We estimate the following costs to incorporate and remove the temporary change to the AFM.

Labor cost	Parts cost	Total cost per airplane
0.5 work-hour × $80 per hour = $40	Not Applicable	$40

We estimate that the post-flight residual heat check requires about 3 minutes to do. We estimate the following costs to do 10 of the post-flight residual heat checks. We have no way of determining the number of airplanes that would have this post-flight residual heat check, or how many times this will need to be performed before the terminating action is done:

Labor cost to do 10 post-flight residual heat checks	Parts cost	Total cost per airplane
0.5 work-hour × $80 per hour = $40	Not Applicable	$40

We estimate the following costs to do the maintenance manual operational test of the heat of the AOA probes. We have no way of determining the number of airplanes that would have this operational test, or how many times this will need to be performed before the terminating action is done:

Labor cost	Parts cost	Total cost per airplane
0.5 work-hour × $80 per hour = $40	Not Applicable	$40

We estimate the following costs to do any upload of software to the AOA transmitters. We have no way of determining the number of airplanes that would have this modification:

Labor cost	Parts cost	Total cost per airplane
4 work-hours × $80 per hour = $320	Not Applicable	$320

We estimate the following costs to do any replacement of 2 stall warning AOA transmitters. We have no way of determining the number of airplanes that would have this replacement:

Labor cost	Parts cost	Total cost per airplane
2 work-hours × $80 per hour = $160	$18,600	$18,760

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this AD.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2008–0353; Directorate Identifier 2007–CE–101–AD'' in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. FAA amends § 39.13 by adding the following new AD:

2008–16–02 Hawker Beechcraft Corporation: Amendment 39–15620; Docket No. FAA–2008–0353; Directorate Identifier 2007–CE–101–AD.

Effective Date

(a) This AD becomes effective on September 3, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model 390 airplanes, serial numbers RB–4 through RB–204, that are certificated in any category.

Unsafe Condition

(d) This AD results from reports of the potential for unannunciated loss of the heating function in the left-hand (LH) and right-hand (RH) stall warning angle-of-attack (AOA) transmitters of Model 390 airplanes. We are issuing this AD to correct potentially inadequate stall warning with loss of stick pusher function.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Incorporate Raytheon Aircraft Company Temporary Change to the FAA Approved Airplane Flight Manual P/N 390–590001–0003CTC7, issued: March 15, 2007, into the airplane flight manual (AFM).	Within 15 hours time-in-service (TIS) after September 3, 2008 (the effective date of the AD) or within 30 days after September 3, 2008 (the effective date of the AD), whichever occurs first.	Not Applicable.
(2) After every flight do the following: (i) Do a post-flight check for residual heat in the AOA probes. CAUTION: TO PREVENT POSSIBLE BURNS, USE EXTREME CAUTION TOUCHING HEATED AREAS. TO CHECK HEATING AND AVOID BURNS, HOLD HAND NEAR HEATED AREA OR MOVE HAND GRADUALLY FROM AMBIENT AREA TOWARD HEATED AREA UNTIL WARMTH CAN BE FELT. If you do not feel heat in the AOA probes, then do paragraph (e)(2)(ii) of this AD; or (ii) Do a post-flight maintenance manual operational test of the heat of the AOA probes. If the AOA probe fails the operational test, replace the AOA probe.	Begin the post-flight checks within 15 hours TIS after September 3, 2008 (the effective date of the AD) or within 30 days after September 3, 2008 (the effective date of the AD), whichever occurs first. Completion of paragraph (e)(3)(i) or (e)(3)(ii) of this AD terminates the required repetitive post-flight checks of this AD. Replace any AOA probe that fails the operational test before further flight.	(A) *For the post-flight check for residual heat in the AOA probes:* Follow Raytheon Aircraft Company Temporary Change to the FAA Approved Airplane Flight Manual Temporary Change P/N 390–590001–0003CTC7, issued: March 15, 2007. The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may do this post-flight check required by paragraph (e)(2)(i) of this AD. Make an entry into the aircraft records showing compliance with this AD following section 43.9 of the Federal Aviation Regulations (14 CFR 43.9). (B) *For the post-flight maintenance manual operational test of the heat of the AOA probes:* Follow Raytheon Aircraft Company Temporary Change to the FAA Approved Airplane Flight Manual Temporary Change P/N 390–590001–0003CTC7, issued: March 15, 2007, and Hawker Beechcraft Mandatory Service Bulletin No. SB 27–3787, issued: May 2007. The maintenance manual operational test must be done by an appropriately rated mechanic. (C) *For AOA probe replacement:* Follow Hawker Beechcraft Mandatory Service Bulletin No. SB 27–3787, issued: May 2007.

Actions	Compliance	Procedures
(3) Replace or modify (upload software) the stall warning AOA transmitters by doing one of the following: (i) Upload new software Kit No. 123–3436 (Field Software Upload SLZ8060–3,–4) to the AOA transmitters; or (ii) Replace any part number (P/N) SLZ8060–3 and/or P/N SLZ8060–4 AOA transmitters with new P/N SLZ8060–5 AOA transmitters.	Within 250 hours TIS after September 3, 2008 (the effective date of this AD) or within 12 months after September 3, 2008 (the effective date of this AD), whichever occurs first. Completion of either paragraph (e)(3)(i) or (e)(3)(ii) of this AD terminates the required repetitive post-flight check of this AD.	Follow Hawker Beechcraft Mandatory Service Bulletin No. SB 27–3787, issued: May 2007.
(4) Remove Raytheon Aircraft Company Temporary Change to the FAA Approved Airplane Flight Manual P/N 390–590001–0003CTC7, issued: March 15, 2007, from the AFM.	Before further flight after doing the actions required by paragraph (e)(3)(i) or paragraph (e)(3)(ii) of this AD.	Follow Hawker Beechcraft Mandatory Service Bulletin No. SB 27–3787, issued: May 2007.
(5) Do not install any P/N SLZ8060–3 or P/N SLZ8060–4 AOA transmitter that does not have the new upgraded software required by paragraph (e)(3)(i) of this AD.	As of September 3, 2008 (the effective date of this AD).	Not Applicable.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Philip Petty, Aerospace Engineer, Wichita ACO, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4139; fax: (316) 946–4107. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(g) You must use Raytheon Aircraft Company Temporary Change to the FAA Approved Airplane Flight Manual P/N 390–590001–0003CTC7, issued: March 15, 2007, and Hawker Beechcraft Mandatory Service Bulletin No. SB 27–3787, issued: May 2007, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Hawker Beechcraft Corporation, 9709 East Central, Wichita, Kansas 67291; telephone: (800) 429–5372 or (316) 676–3140.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on July 23, 2008.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–17329 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0822; Directorate Identifier 2008–CE–045–AD; Amendment 39–15621; AD 2008–16–03]

RIN 2120–AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Model PC–6 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

This Airworthiness Directive (AD) is prompted due to the discovery of cracked or broken leaf springs P/N 6232.0175.01 installed in the overhead flap-operating mechanism of some PC–6 aircraft. A broken leaf spring could lead to an uncommanded flap retraction which could lead to hazardous situations and subsequent loss of control of the aircraft.

This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective August 11, 2008.

On August 11, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

We must receive comments on this AD by August 29, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

The Federal Office of Civil Aviation (FOCA), which is the aviation authority for Switzerland, has issued FOCA EMERGENCY AD HB–2008–242 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

This Airworthiness Directive (AD) is prompted due to the discovery of cracked or broken leaf springs P/N 6232.0175.01 installed in the overhead flap-operating mechanism of some PC–6 aircraft. A broken leaf spring could lead to an uncommanded flap retraction which could lead to hazardous situations and subsequent loss of control of the aircraft.

This AD is published by Federal Office of Civil Aviation (FOCA) Switzerland, as State of production and because it is possible that the leaf springs were not manufactured properly.

In order to correct and control the situation, this AD requires the initial and repetitive inspections of the leaf springs in the flap operating mechanism and the replacement of broken parts.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Pilatus Aircraft Limited has issued Pilatus PC–6 Service Bulletin No. 27–002 and Pilatus PC–6 Service Bulletin 27–003, both dated July 2, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all information provided by the State of Design Authority and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

The MCAI allows for replacement parts with like parts that are prone to cracking. The reason for the 25-hour repetitive inspection is because the cracks are occurring quickly. We believe that allowing replacement with the same part numbers that are cracking when improved design part numbers exist allows the unsafe condition to continue. Therefore we are requiring replacement with the new improved part numbers if cracks are found.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because a broken leaf spring could lead to an uncommanded flap retraction and lead to loss of control during final approach. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0822; Directorate Identifier 2008–CE–045–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2008–16–03 Pilatus Aircraft Limited: Amendment 39–15621; Docket No. FAA–2008–0822; Directorate Identifier 2008–CE–045–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective August 11, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Models PC–6, PC–6–H1, PC–6–H2, PC–6/350, PC–6/350–H1,

PC–6/350–H2, PC–6/A, PC–6/A–H1, PC–6/A–H2, PC–6/B–H2, PC–6/B1–H2, PC–6/B2–H2, PC–6/B2–H4, PC–6/C–H2, and PC–6/C1–H2 airplanes, manufacturer serial numbers (MSN) MSN 101 through MSN 999 and MSN 2001 through MSN 2092, certificated in any category, with mechanically operated flaps and leaf springs, part number (P/N) 6232.0175.01 installed in the overhead flap-operating mechanism.

Note: These airplanes may also be identified as Fairchild Republic Company PC–6 airplanes, Fairchild Heli Porter PC–6 airplanes, or Fairchild-Hiller Corporation PC–6 airplanes.

Subject

(d) Air Transport Association of America (ATA) Code 27: Flight Controls.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

This Airworthiness Directive (AD) is prompted due to the discovery of cracked or broken leaf springs P/N 6232.0175.01 installed in the overhead flap-operating mechanism of some PC–6 aircraft. A broken leaf spring could lead to an uncommanded flap retraction which could lead to hazardous situations and subsequent loss of control of the aircraft.

This AD is published by Federal Office of Civil Aviation (FOCA) Switzerland, as State of production and because it is possible that the leaf springs were not manufactured properly.

In order to correct and control the situation, this AD requires the initial and repetitive inspections of the leaf springs in the flap operating mechanism and the replacement of broken parts.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Before the next flight after the effective date of this AD, do a visual inspection of the leaf springs installed in the overhead flap-operating mechanism for cracks following Pilatus Aircraft Ltd. Pilatus PC–6 Service Bulletin No. 27–002, dated July 2, 2008.

(2) If any cracks are found in the leaf springs installed in the overhead flap-operating mechanism, before further flight, remove the three leaf springs, P/N 6232.0175.01, installed in the overhead flap-operating mechanism, and replace with three new leaf springs, P/N 116.45.06.040, in the overhead flap-operating mechanism following Pilatus Aircraft Ltd. Pilatus PC–6 Service Bulletin No. 27–003, dated July 2, 2008.

(3) Repetitively inspect thereafter at intervals not to exceed 25 hours time-in-service following Pilatus Aircraft Ltd. Pilatus PC–6 Service Bulletin No. 27–002, dated July 2, 2008, until the modification required in paragraph (f)(2) of this AD is done. If any cracks are found in the leaf springs installed in the overhead flap-operating mechanism, before further flight, remove the three leaf springs, P/N 6232.0175.01, and replace with three new leaf springs, P/N 116.45.06.040, following Pilatus Aircraft Ltd. Pilatus PC–6 Service Bulletin No. 27–003, dated July 2, 2008.

(4) As of the effective date of this AD, do not install any P/N 6232.0175.01 leaf spring in the overhead flap-operating mechanism.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Special Flight Permit

(h) If cracks are detected during the inspection required in (f)(1) or (f)(3) of this AD, no further flight is permitted until the modification required in paragraph (f)(2) or (f)(3) of this AD is done.

Related Information

(i) Refer to MCAI FOCA EMERGENCY AD HB–2008–242, dated July 4, 2008, and Pilatus Aircraft Ltd. Pilatus PC–6 Service Bulletin No. 27–002 and Pilatus Aircraft Ltd. Pilatus PC–6 Service Bulletin 27–003, both dated July 2, 2008, for related information.

Material Incorporated by Reference

(j) You must use Pilatus Aircraft Ltd. Pilatus PC–6 Service Bulletin No. 27–002 and Pilatus Aircraft Ltd. Pilatus PC–6 Service Bulletin 27–003, both dated July 2, 2008 to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Pilatus Aircraft Ltd., Customer Liaison Manager, CH 6371 STANS, Switzerland; telephone: + 41 (0)41 619 6580; fax: + 41 (0)41 619 6576; e-mail: *fodermatt@pilatus aircaft.com*.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Kansas City, Missouri, on July 23, 2008.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–17331 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0187; Airspace Docket No. 07–ASO–27]

Modification of Area Navigation Route Q–110 and Jet Route J–73; Florida

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action extends the length of Area Navigation (RNAV) route Q–110 and makes a minor realignment of jet route J–73 in Florida. These modifications support the Florida West Coast Airspace Redesign project. The extension of Q–110 provides an RNAV route for use by aircraft transitioning between Miami Air Route Traffic Control Center (ARTCC) and Jacksonville ARTCC airspace. The extension also assists aircraft in circumnavigating military airspace associated with the Avon Park Air Force Range. The realignment of J–73 provides space for the Q–110 extension. The FAA is taking this action to enhance the safe and the efficient use of the navigable airspace in the western Florida area.

DATES: *Effective Date:* 0901 UTC, September 25, 2008. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On April 17, 2008, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to modify Q–110 and J–73 in western Florida (73 FR 20844) Airspace Docket No. FAA–

2008–0187. Interested parties were invited to participate in this rulemaking effort by submitting written comments on this proposal to the FAA. No comments were received in response to the proposal.

In the notice of proposed rulemaking, the FAA indicated its intent to make an administrative change to the order of the points listed in the route description of Q–110. However, to be consistent with flight inspection documentation for Q–110, other than adding the three new points for the route extension, the order of the listing of points will not be changed. This has no effect on the alignment or charting of Q–110.

Jet routes are published in paragraph 2004, and high altitude RNAV routes are published in paragraph 2006, of FAA Order 7400.9R signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The jet route and RNAV route listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by extending the length of RNAV route Q–110 and realigning jet route J–73 in western Florida. RNAV route Q–110 is extended southeastward from KPASA, FL (located near Lakeland, FL) to the THNDR, FL, intersection (located about midway between Fort Myers and West Palm Beach, FL), adding approximately 115 nautical miles (NM) to the length of the route. The Q–110 extension provides an RNAV route for use by aircraft transitioning between Miami ARTCC and Jacksonville ARTCC airspace and assists aircraft in circumnavigating military airspace associated with the Avon Park Air Force Range.

Additionally, the segment of jet route J–73 between the LaBelle, FL, very high frequency omnidirectional range/tactical navigation aid (VORTAC) and the Lakeland, FL, VORTAC is realigned by inserting an intermediate point formed by the intersection of the LaBelle 314° True (T) radial and the Lakeland 162° T radial. Shifting J–73 in this manner provides airspace to accommodate the Q–110 extension.

The FAA is taking this action to enhance the safe and the efficient use of the navigable airspace in the western Florida area. With the exception of order of points listed in the Q–110 route description, this amendment is the same as that proposed in the NPRM.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies an RNAV route and jet route in Florida.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' paragraph 311a, 311b, and 311k. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9R, Airspace Designations and Reporting Points, signed August 15, 2007, and effective September 15, 2007, is amended as follows:

Paragraph 2004 Jet Routes.

* * * * *

J–73 [Amended]

From Dolphin, FL; LaBelle, FL; INT Labelle 314° and Lakeland, FL, 162° radials; Lakeland; Seminole, FL; La Grange, GA; Nashville, TN; Pocket City, IN; to Northbrook, IL.

* * * * *

Paragraph 2006 United States Area Navigation Routes.

* * * * *

Q–110 THNDR, FL to FEONA, GA [Amended]

THNDR, FL	INT	(Lat. 26°37′38″ N., long. 80°52′00″ W.)
JAYMC, FL	WP	(Lat. 26°58′51″ N., long. 81°22′08″ W.)
RVERO, FL	WP	(Lat. 27°24′35″ N., long. 81°35′57″ W.)
KPASA, FL	WP	(Lat. 28°10′34″ N., long. 81°54′27″ W.)
BRUTS, FL	WP	(Lat. 29°30′58″ N., long. 82°58′57″ W.)
GULFR, FL	WP	(Lat. 30°12′23″ N., long. 83°33′08″ W.)
FEONA, GA	WP	(Lat. 31°36′22″ N., long. 84°43′08″ W.)

* * * * *

Issued in Washington, DC, on July 22, 2008.

Stephen L. Rohring,

Acting Manager, Airspace and Rules Group.

[FR Doc. E8–17389 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0755]

RIN 1625–AA00

Safety Zone: LST–1166 Safety Zone, Southeastern Tip of Lord Island, Columbia River, Rainier, OR

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of the Columbia River encompassed in a 500 foot radius surrounding the LST–1166 vessel located near the southeastern tip of Lord Island at position 46°07′18″ N 123°00′51″ W adjacent to the Oregon shoreline. Entry into this safety zone is prohibited during the cleanup operation unless authorized by the Captain of the Port or his designated representatives. The Captain of the Port Portland, Oregon is taking this action to ensure the safety of boaters transiting this area and the safety of the people conducting the cleanup operation of the LST–1166.

DATES: This regulation is effective from 8 a.m. on July 22, 2008 to 8 p.m. on September 30, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0755 and are available online at *www.regulations.gov*. They are also available for inspection or copying at two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and Coast Guard Sector Portland, 6767 N. Basin Ave., Portland, OR 97217 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: BM2 Joshua Lehner, c/o Captain of the Port Portland, 6767 N. Basin Ave, Portland, OR 97217–3992, and (503) 240–9311.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for not publishing an NPRM and for making this rule effective less than 30 days after publication in the **Federal Register**. Due to the fact that the cleanup operation was only recently authorized by the federal government, earlier notice was unavailable. Publishing a NPRM would be contrary to public interest since immediate action is necessary to ensure the safety of the public and the environment during the cleanup operation. The public or environment must not be exposed to the asbestos and PCB's which require removal from the vessel as well as the physical cables and lines which may surround the vessel. If normal notice and comment procedures were followed, this rule would not become effective until after the date of the event. For this reason, following the normal rule making procedures in this case would be impracticable and contrary to the public.

Background and Purpose

The Coast Guard is establishing a safety zone on the waters of the Columbia River encompassed in a 500 foot radius surrounding the LST–1166 Vessel located near the southeastern tip of Lord Island on the Oregon shoreline. The safety zone is scheduled to start at 8 a.m. on July 22, 2008 to 8 p.m. on September 30, 2008. The safety zone will exclude vessels from transiting the cleanup area surrounding the LST–1166 which will consist of cables, tow lines and dive operations. This safety zone will be enforced by representatives of the Captain of the Port Portland. The Captain of the Port may be assisted by other federal, state, and local agencies.

Discussion of Rule

This temporary rule will create a safety zone to minimize the inherent dangers associated with the cleanup operation of the Vessel LST–1166. This is to allow for a safe cleanup operation of the Vessel LST–1166 to keep the public clear any hazardous material that could be associated with the operation. The dangers included in these operations are, but are not limited to, navigational hazards from small watercrafts and cleanup equipment in the waterway and any hazardous material that could be associated with the operation such as exposure to asbestos and PCB's. Passage through the safety zone would be authorized by the Captain of the Port Portland, his designated representative on scene. The Coast Guard, through this action, intends to promote the safety of personnel and vessels in the area during these operations.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The Coast Guard expects the economic impact of this temporary rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This expectation is based on the fact that the safety zone established by this rule will restrict passage between the southern shoreline of Lord Island and the Oregon shoreline of the Columbia River. Passage through the Safety Zone will be enforced by representatives of the Captain of the Port Portland and actively managed by a representative on scene. The Captain of the Port may be assisted by other federal, state, and local agencies. This regulation is established for the benefit and safety of the public and the personnel conduction the cleanup operation. This rule will be effective from 8 a.m. on July 22, 2008 to 8 p.m. on September 30, 2008. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in the portion of Newport Harbor during the time mentioned under Background and Purpose.

This safety zone will not have a significant economic impact on a substantial number of small entities due to its location. Although the safety zone may be in place for a significant amount of time the safety zone is small in size and is located well outside of the navigational channel of the Columbia River. The vessels most likely to be impacted will be recreational boaters, small passenger vessel operators and commercial barge operators but these vessels can transit the main channel and avoid this safety zone altogether. Because the impacts of this proposal are expected to be so minimal, the Coast Guard certifies under 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that this temporary rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those unfunded mandate costs. This rule will not impose an unfunded mandate.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded, under the Instruction, that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because it establishes a safety zone. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. A temporary section in 165.T13–060 is added to read as follows:

§ 165.T13–060 LST–1166 Safety Zone, Southeastern Tip of Lord Island, Columbia River, Rainier, Oregon.

(a) *Safety Zone.* The following area is a designated safety zone:

(1) Near the southeastern most tip of Lord Island on the Oregon Shoreline of the Columbia River, Rainier, Oregon.

(i) *Location:* waters of the Columbia River encompassed in the 500 foot radius surrounding the vessel LST–1166 located at position 46° 07′18″ N, 123°00′51″ W.

(ii) *Effective time and date:* 8 a.m. on July 22, 2008 to 8 p.m. on September 30, 2008.

(b) *Regulations.* In accordance with the general regulations in § 165.23 of this part, no person or vessel may enter or remain in this zone unless authorized by the Captain of the Port. Vessels and persons granted authorization to enter the safety zone shall obey all lawful orders and directions of the Captain of the Port or his designated representatives.

(c) Vessels wishing to request permission to enter the safety zone may contact the federal or local representatives on scene VHF Channel 16 or by calling 503–240–9311 or the Fred Devine Diving & Salvage Co. escort vessel on VHF Channel 16.

Dated: July 22, 2008

F.G. Myer,

Captain, U.S. Coast Guard, Captain of the Port Portland.

[FR Doc. E8–17386 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0725]

RIN 1625–AA00

Temporary Safety Zone: Red Bull Flugtag, Portland, OR

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the Red Bull Flugtag to be held on the waters of the Willamette River in the vicinity of McCall's Waterfront Park in Portland, Oregon. The safety zone will restrict vessels from entering the designated area during the marine event. This temporary rule is needed to provide for the safety of participants in the event.

DATES: This regulation is effective from 10:30 a.m. to 5 p.m. on August 2, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0725 and are available online at *www.regulations.gov.* They are also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and Coast Guard Sector Portland, 6767 N. Basin Ave., Portland, OR 97217 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: BM2 Joshua Lehner, c/o Captain of the Port Portland, 6767 N. Basin Ave., Portland, OR 97217–3992, and (503) 240–9311.

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for not publishing an NPRM and for making this rule effective less than 30 days after publication in the **Federal Register**. The emergent and dynamic nature of the event did not allow previous notice. Publishing a NPRM would be contrary to public interest since immediate action is necessary to ensure the safety of participants and spectators. If normal notice and comment procedures were followed, this rule would not become effective until after the date of the event. For this reason, following the normal rule making procedures in this case would be impracticable and contrary to the public.

Background and Purpose

The Coast Guard is establishing a temporary safety zone to allow for a safe marine event. This event occurs on the Willamette River in the vicinity of McCall's Waterfront Park in Portland, Oregon and is scheduled to start at 10:30 a.m. and last until 5 p.m. on August 2, 2008. This event may result in a number of recreational vessels congregating near the marine event. The marine event poses several dangers to the participants including river currents, vessel traffic and debris on the river. Accordingly, the Safety Zone is needed to protect event participants and spectators from safety hazards associated with the event. This safety zone will be enforced by representatives of the Captain of the Port Portland. The Captain of the Port may be assisted by other federal, state, and local agencies.

Discussion of Rule

This temporary rule will create a safety zone to assist in minimizing the inherent dangers associated with the marine event. These dangers include, but are not limited to, river currents, vessel traffic and river debris. The Coast Guard, through this action, intends to promote the safety of personnel, vessels, and facilities in the area. Due to these concerns, public safety requires these regulations to provide for the safety of life on the navigable waters.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The Coast Guard expects the economic impact of this temporary rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This expectation is based on the fact that the safety zone established by this rule encompasses an area on the Willamette River near McCall's Waterfront Park in Portland, Oregon that is not a major commercial navigation or public boating area. This regulation is established for the benefit and safety of the recreational boating public, and any negative recreational boating impact is offset by the benefits of allowing the marine event. This rule will be effective from 10:30 a.m. to 5 p.m. on August 02, 2008. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in a portion of the Willamette River during the time mentioned under *Background and Purpose.* This safety zone will not have a significant economic impact on a substantial number of small entities due to its short duration and small area. The only vessels likely to be impacted will be recreational boaters, small passenger vessel operators. Because the impacts of this proposal are expected to be so minimal, the Coast Guard certifies under 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that this temporary rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those unfunded mandate costs. This rule will not impose an unfunded mandate.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded, under the instruction, that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because it establishes a safety zone. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. A temporary section in 165.T13–052 is added to read as follows:

§ 165.T13–052 Safety Zone; Red Bull Flugtag, Portland, Oregon.

(a) *Location.* The following area is a safety zone: The waters of the Willamette River from surface to bottom 200' radius surrounding the Red Bull Flugtag; in the vicinity of McCall's Waterfront Park in Portland, Oregon.

(b) *Enforcement period.* This rule will be in effect from 10:30 a.m. to approximately 5 p.m. on August 02, 2008 in the described waters of the Willamette River in Portland, Oregon.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, no person or vessel not participating in the actual marine event may enter or remain in this zone unless authorized by the Captain of the Port or his designated representatives. Vessels and persons granted authorization to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port or his designated representatives.

(d) Vessels wishing to request permission to enter the safety zone may contact the official patrol on VHF Channel 16 or by calling 503–240–9311.

Dated: July 21, 2008.

F.G. Myer,

Captain, U.S. Coast Guard, Captain of the Port, Portland.

[FR Doc. E8–17385 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0726]

RIN 1625–AA00

Temporary Safety Zone: Astoria Regatta Assoc. Display, Astoria, OR

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the Astoria Regatta Assoc. Display to be held on the waters of the Columbia River in the vicinity of Astoria's waterfront in Astoria, Oregon. The safety zone will restrict vessels from entering the designated area during the fireworks display. This temporary rule is needed to provide for the safety of life on navigable waters during the event.

DATES: This regulation is effective from 8:30 p.m. to 11:30 p.m. on August 9, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–0726 and are available online at *www.regulations.gov.* They are also available for inspection or copying at two locations: the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and Coast Guard Sector Portland, 6767 N. Basin Ave., Portland, OR 97217 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: BM2 Joshua Lehner, c/o Captain of the Port Portland, 6767 N. Basin Ave, Portland, OR 97217–3992, and (503) 240–9311.

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for not publishing an NPRM and for making this rule effective less than 30 days after publication in the **Federal Register**. The emergent and dynamic nature of the event did not allow previous notice. Publishing a NPRM would be contrary to public interest since immediate action is necessary to ensure the safety of vessels and spectators. If normal notice and comment procedures were followed, this rule would not become effective until after the date of the event. For this reason, following the normal rule making procedures in this case would be impracticable and contrary to the interests of public safety.

Background and Purpose

The Coast Guard is establishing a temporary safety zone to allow for a safe fireworks display. This event occurs on the Columbia River in the vicinity of Astoria's waterfront, Astoria, Oregon and is scheduled to start at 8:30 p.m. and last until 11:30 p.m. on August 9, 2008. This event may result in a number of recreational vessels congregating near the fireworks display. The firework display poses several dangers to the public including excessive noise, falling firework debris and possible explosion. Accordingly, the safety zone is needed to protect watercraft and their occupants from safety hazards associated with the event. This safety zone will be enforced by representatives of the Captain of the Port Portland. The Captain of the Port may be assisted by other federal, state, and local agencies.

Discussion of Rule

This temporary rule will create a safety zone to assist in minimizing the inherent dangers associated with fireworks display. These dangers include, but are not limited to, excessive noise, falling firework debris and possible explosion. The Coast Guard, through this action, intends to promote the safety of personnel, vessels, and facilities in the area. Due to these concerns, public safety requires these regulations to provide for the safety of life on the navigable waters.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The Coast Guard expects the economic impact of this temporary rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This expectation is based on the fact that the safety zone established by this rule encompasses a relatively small area on the Columbia River near Astoria's Waterfront in Astoria, OR, does not shut down the shipping lane, and will be of very short duration. This regulation is established for the benefit and safety of the recreational boating public, and any negative recreational boating impact is offset by the benefits of allowing the fireworks display. This rule will be effective from 8:30 p.m. to 11:30 p.m. on August 09, 2008. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in a portion of the Columbia River during the time mentioned under *Background and Purpose.* This safety zone will not have a significant economic impact on a substantial number of small entities due to its short duration and small area. The only vessels likely to be impacted will be recreational boaters, small passenger vessel operators and commercial barge operators. Because the impacts of this proposal are expected to be so minimal, the Coast Guard certifies under 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that this temporary rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business

Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a state, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those unfunded mandate costs. This rule will not impose an unfunded mandate.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded, under the Instruction, that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because it establishes a safety zone. A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' will be available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and Record Keeping Requirements, Security Measures, and Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. A temporary section in 165.T13–053 is added to read as follows:

§ 165.T13–053 Safety Zone; Astoria Regatta Assoc. Display, Astoria, Oregon.

(a) *Location.* The following area is a safety zone: The waters of the Columbia River from surface to bottom, encompassed by lines connecting the following points: from the southern bank of the Columbia River at latitude 46°11′34″ N, longitude 123°48′33″ W, thence North to 46°11′52″ N, 123°48′35″ W, thence East to latitude 46°11′52″ N, longitude 123°48′19″ W thence to the southern shoreline located at 46°11′39″ N, 123°48′13″ W and continuing back along the shoreline to the first point in the vicinity of Astoria's waterfront on the Columbia River in Astoria, Oregon.

(b) *Enforcement period.* This rule will be in effect from 8:30 p.m. to approximately 11:30 p.m. on August 9, 2008 in the described waters of the Columbia River in Astoria, Oregon.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, no person or vessel not participating in the actual fireworks display may enter or remain in this zone unless authorized by the Captain of the Port or his designated representatives. Vessels and persons granted authorization to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port or his designated representatives.

(d) Vessels wishing to request permission to enter the safety zone may contact the official patrol on VHF Channel 16 or by calling 503–240–9311.

Dated: July 21, 2008.

F.G. Myer,

Captain, U.S. Coast Guard, Captain of the Port Portland.

[FR Doc. E8–17387 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0237; FRL–8695–7]

Revisions to the California State Implementation Plan, Ventura County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the Ventura County Air Pollution Control District (VCAPCD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on May 9, 2008 and concern oxides of nitrogen (NO_X) emissions from stationary internal combustion engines. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date*: This rule is effective on August 29, 2008.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2008–0237 for this action. The index to the docket is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Francisco Dóñtez, EPA Region IX, (213) 244–1834, *Donez.Francisco@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

I. Proposed Action

On May 9, 2008 (73 FR 26355), EPA proposed to approve the following rule into the California SIP.

Local agency	Rule #	Rule title	Adopted	Submitted
VCAPCD	74.9	Stationary Internal Combustion Engines	11/08/05	03/10/06

We proposed to approve this rule because we determined that it complied with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rule complies with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving this rule into the California SIP.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 29, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: June 30, 2008.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(344)(i)(D) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(344) * * *

(i) * * *

(D) Ventura County Air Pollution Control District.

(*1*) Rule 74.9, Stationary Internal Combustion Engines, adopted on November 8, 2005.

* * * * *

[FR Doc. E8–17471 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0511; FRL–8372–9]

1-Methylcyclopropene; Pesticide Tolerance; Technical Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical correction.

SUMMARY: EPA issued a final rule in the **Federal Register** of April 9, 2008 (73 FR 19147) (FRL–8357–5), concerning 1-methylcyclopropene (1-MCP); amendment to an exemption from the requirement of a tolerance. This document is being issued to correct a technical error, specifically the omission of addressing the comments received after the publication of the notice of filing on August 8, 2007 (72 FR 44520) (FRL–8138–9).

DATES: This final rule is effective July 30, 2008.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0511. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Driss Benmhend, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9525; e-mail address: *benmhend.driss@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

The Agency included in the final rule a list of those who may be potentially affected by the action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under the **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using regulations.gov, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. What Does this Correction Do?

The final rule, identified as FR Doc. E8–7458 that was published in the **Federal Register** of April 9, 2008 (73 FR 19147) (FRL–8357–5) is corrected as follows:

On page 19148, under ''**II. BACKGROUND AND STATUTORY FINDINGS**'', the last sentence of paragraph one, ''There were no comments received in response to the notice of filing'', is corrected to read as follows:

After the publication of the notice of filling, the following comments were received and reviewed by the Agency:

The first set of comments raised concerns that the Agency may not have completely assessed the safety of the active ingredient for its new outdoor use, especially with regard to its fate and behavior in the outdoor environment. The second set of comments addressed the potential negative effects on human health as a result of the new use of 1-MCP for pre-harvest treatments on fruits and vegetables.

The active ingredient, 1-methylcyclopropene, has been completely assessed by the Agency for its potential for adverse environmental effects, particularly in regard to non-target organisms, including threatened and endangered species. Its effects on the environment (if any) are directly related to its mode of action as an ethylene inhibitor in plants. Animals have no ethylene receptors and, therefore, it is highly unlikely that 1-MCP would have any adverse effects on animals. Furthermore, the product is applied at extremely low rates. The maximum use rate permitted on the product label is approximately 0.28 lbs (121.4 g) of 1-MCP/acre.

1-MCP is a volatile gas. When dissolved in water and applied to field crops and orchards, 1-MCP will rapidly volatilize from plant and soil surfaces and its effects will be confined to the plant tissues to which it has been directly applied. Once in the atmosphere, it will be rapidly diluted and degraded by sunlight and reaction with hydroxyl molecules within approximately 6.4 hours master record identification number ((MRIDs) 471082–06 & 471082–07). A study by the European Food and Safety Authority concurs with EPA's conclusion, and has estimated an atmospheric half-life of 1-MCP to be about 4.4 hours (EFSA, 2005).

A study on soil leaching (MRID 47108204) demonstrated that more than

97% of applied 1-MCP was bound rapidly and tightly to the surfaces of four different soil types, and that no 1-MCP was detected in the soil leachates. This study indicates that 1-MCP has extremely low mobility in the soil and that it is highly unlikely that it will move into ground water. Modeling of potential runoff into surface waters using the generic expected environmental concentration (GENEEC) 2, shows that the maximum potential concentration of 1-MCP in surface waters following runoff would not exceed approximately 25 ppb.

With regard to the potential exposure and effects on human health as a result of the newly approved usage of 1-MCP in pre-harvest treatments, the applicant submitted extensive guideline animal studies. These studies were conducted using doses much greater than any measured or estimated environmental concentration of 1-MCP following applications at the maximum allowable label rate. EPA reviews of these studies concluded that 1-MCP has no adverse effects on any animal organism tested. These reviews are discussed in detail in the April 9, 2008 **Federal Register** document (73 FR 19147).

Furthermore, based on the nature of residue studies (D339988, MRIDs 47088611–12 & 47108203, field residue studies demonstrate that environmental concentrations of 1-MCP will be extremely low following applications at the maximum allowable product label use rate. When the product was applied to apple trees at the maximum product label use rate 0.28 lbs (121.4 g) 1-MCP/acre, 1-MCP residues ranged from 3 to 4 parts per billion (ppb) on apple fruits, at 3 to 7 days post-treatment; 212 to 379 ppb on apple leaves at 3 to 30 days post-treatment; and 17 ppb in the upper 2 centimeter of soil below the tree at 1 day post-treatment

The Agency does not expect any human health concerns or negative effect on non-target organisms including endangered species, from exposure to residues of 1-MCP when applied or used as directed on the label and in accordance with good agricultural practices.

III. Why is this Correction Issued as a Final Rule?

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), provides that, when an Agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the Agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's technical correction final without prior proposal and opportunity for comment, because EPA is merely responding to comments that were not addressed in the previously published final rule. The comments received and reviewed do not affect EPA's decision for establishing an amendment to the tolerance exemption for the use 1-MCP for pre-harvest treatment. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

IV. Do Any of the Statutory and Executive Order Reviews Apply to this Action?

No. The applicable statutory and Executive order reviews were included in the April 8, 2008 **Federal Register** document. This document is a technical correction and as such no new reviews are applicable.

V. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and Recordkeeping Requirements.

Dated: July 23, 2008.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–17478 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2006–0234; FRL–8370–8]

Gentamicin; Pesticide Tolerance for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for residues of gentamicin in or on apples. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on apples. This regulation establishes a maximum permissible level for residues of gentamicin in this food commodity. The time-limited tolerance expires and is revoked on December 31, 2010.

DATES: This regulation is effective July 30, 2008. Objections and requests for hearings must be received on or before September 29, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2006–0234. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; e-mail address: *ertman.andrew@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2006–0234 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before September 29, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2006–0234, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with sections 408(e) and 408(l)(6) of FFDCA, 21 U.S.C. 346a(e) and 346a(1)(6), is establishing a time-limited tolerance for residues of the agricultural antibiotic gentamicin, in or on apples at 0.10 parts per million (ppm). This time-limited tolerance expires and is revoked on December 31, 2010. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the CFR.

Section 408(l)(6) of FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on section 18 related time-limited tolerances to set binding precedents for the application of section 408 of FFDCA and the new safety standard to other tolerances and exemptions. Section 408(e) of FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, i.e., without having received any petition from an outside party.

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *''

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

III. Emergency Exemption for Gentamicin on Apples and FFDCA Tolerances

The State of Michigan requested the use of gentamicin on apples due to the development of resistance of fire blight to the pesticide streptomycin and the lack of viable control options. After having reviewed the submission, EPA determined that emergency conditions exist for this State, and that the criteria for an emergency exemption are met. EPA has authorized under FIFRA section 18 the use of gentamicin on apples for control of fire blight in Michigan.

As part of its evaluation of the emergency exemption application, EPA assessed the potential risks presented by residues of gentamicin in or on apples. In doing so, EPA considered the safety standard in section 408(b)(2) of FFDCA, and EPA decided that the necessary tolerance under section 408(l)(6) of FFDCA would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing this tolerance without notice and opportunity for public comment as provided in section 408(l)(6) of FFDCA. Although this time-limited tolerance expires and is revoked on December 31, 2010, under section 408(l)(5) of FFDCA, residues of the pesticide not in excess of the amount specified in the tolerance remaining in or on apples after that date will not be unlawful, provided the pesticide was applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by this time-limited tolerance at the time of that application. EPA will take action to revoke this time-limited tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because this time-limited tolerance is being approved under emergency conditions, EPA has not made any decisions about whether gentamicin meets FIFRA's registration requirements for use on apples or whether a permanent tolerance for this use would be appropriate. Under these circumstances, EPA does not believe that this time-limited tolerance decision serves as a basis for registration of gentamicin by a State for special local needs under FIFRA section 24(c). Nor does this tolerance serve as the basis for persons in any State other than Michigan to use this pesticide on this crop under FIFRA section 18 absent the issuance of an emergency exemption applicable within that State. For additional information regarding the emergency exemption for gentamicin, contact the Agency's Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT**.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure expected as a result of this emergency exemption request and the time-limited tolerance for residues of gentamicin on apples at 0.10 ppm. EPA's assessment of exposures and risks associated with establishing time-limited tolerances follows.

A. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effect are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects are observed of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-term, intermediate-term, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for gentamicin used for human risk assessment can be found at *http://www.regulations.gov* in the document registration #06MI01. ''Section 18 Emergency Exemption for the application of Gentamicin Sulfate to Apples. Human-Health Risk Assessment'' pages 25–26 in docket ID number EPA–HQ–OPP–2006–0234.

B. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to gentamicin, EPA considered exposure under the time-limited tolerance established by this action. EPA assessed dietary exposures from gentamicin in food as follows:

i. *Acute exposure*. No such effects were identified in the toxicological studies for gentamicin; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. A Tier 1 chronic dietary-exposure assessment was conducted using the established/recommended tolerances for all food commodities, 100% crop treated information for all proposed and existing uses, and DEEM™ Version 7.81 default processing factors for some processed commodities. Drinking water was incorporated directly into the dietary assessment using the EDWC generated by GENEEC2.

iii. *Cancer*. A cancer dietary exposure assessment was not performed for gentamicin because gentamicin is not likely to be carcinogenic to humans.

iv. *Anticipated residue and percent crop treated (PCT) information*. EPA did not use anticipated residue and/or PCT information in the dietary assessment for gentamicin. Tolerance level residues and/or 100% CT were assumed for all food commodities.

2. *Dietary exposure from drinking water*.The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for gentamicin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of gentamicin. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

A Tier I Generic Expected Environmental Concentration (GENEEC2) screening model was used to determine estimated surface water concentrations of gentamicin following 3 applications to apples.

Based on the GENEEC2 model described above, the highest estimated drinking water concentration (EDWC) of gentamicin for chronic exposure is estimated to be 45.08 ppb for ground water and surface water. Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model (DEEM Version 7.81). The modeled exposure scenario was conservative, as compared to the section 18 use pattern.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Gentamicin is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found gentamicin to share a common mechanism of toxicity with any other substances, and gentamicin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that gentamicin does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative*.

C. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional SF when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. Based on data reviewed by the Agency, there is no evidence of increased susceptibility in the developmental studies in rats, rabbits, mice, and guinea pigs. Furthermore, there is no evidence in increased susceptibility in the 2-generation reproduction study in rats. In all studies, gentamicin was tested parentrally, which is very conservative since about 1% of the oral dose is absorbed. The doses tested in these studies are 100-fold higher than the hypothetical oral dose. Therefore, there is no residual uncertainty for prenatal and/or postnatal susceptibility

3. *Conclusion*. EPA has determined that reliable data show that the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for gentamicin is complete.

ii. There is no indication that gentamicin is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that gentamicin results in increased susceptibility in the developmental studies in rats, rabbits, mice, and guinea pigs. There is no evidence of increased susceptibility in the 2-generation reproduction study in rats.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to gentamicin in drinking water. These assessments will not underestimate the exposure and risks posed by gentamicin.

D. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-term, intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effect resulting from a single-oral exposure was identified, therefore, no acute dietary endpoint was selected. Therefore, gentamicin is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to gentamicin from food and water will utilize 1% of the cPAD for the U.S. population, 4% of the cPAD for all infants less than 1 year old, and 3% of the cPAD for children 1-2 years old. All other population subgroups utilize 2% or less of the cPAD. There are no residential uses for gentamicin that result in chronic residential exposure to gentamicin.

3. *Short-term and intermediate-term risk*. Short-term and intermediate-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Gentamicin is not registered for any use patterns that would result in residential exposure. Therefore, the short-term aggregate risk is the sum of the risk from exposure to gentamicin through food and water and will not be greater than the chronic aggregate risk.

4. *Aggregate cancer risk for U.S. population*. Gentamicin is not likely to be carcinogenic to humans and is therefore not expected to pose a cancer risk.

5. *Pharmaceutical aggregate risk*. Section 408 of the FFDCA requires EPA to consider potential sources of exposure to a pesticide and related substances in addition to the dietary sources expected to result from a pesticide use subject to the tolerance. In order to determine whether to maintain a pesticide tolerance, EPA must ''determine that there is a reasonable certainty of no harm.'' Under FFDCA section 505, the Food and Drug Administration (FDA) reviews human drugs for safety and effectiveness and may approve a drug notwithstanding the possibility that some users may experience adverse side effects. EPA does not believe that, for purposes of the section 408 dietary risk assessment, it is compelled to treat a pharmaceutical user the same as a non-user, or to assume that combined exposures to

pesticide and pharmaceutical residues that lead to a physiological effect in the user constitutes ''harm'' under the meaning of section 408 of the FFDCA. Rather, EPA believes the appropriate way to consider the pharmaceutical use of gentamicin in its risk assessment is to examine the impact that the additional nonoccupational pesticide exposures would have to a pharmaceutical user exposed to a related (or, in some cases, the same) compound. Where the additional pesticide exposure has no more than a minimal impact on the pharmaceutical user, EPA could make a reasonable certainty of no harm finding for the pesticide tolerances of that compound under section 408 of the FFDCA. If the potential impact on the pharmaceutical user as a result of co-exposure from pesticide use is more than minimal, then EPA would not be able to conclude that dietary residues were safe, and would need to discuss with FDA appropriate measures to reduce exposure from one or both sources.

The pesticidal exposure estimates reflect the dietary dose from pesticidal uses of gentamicin that a user treated with a pharmaceutical gentamicin product would receive in a reasonable worst-case scenario. EPA's pesticide exposure assessment has taken into consideration the appropriate population, exposure route, and exposure duration for comparison with exposure to the pharmaceutical use of gentamicin.

EPA estimates that the pharmaceutical gentamicin exposure a user is expected to receive from a typical therapeutic dose (3–7.5 milligrams/kilogram/day (mg/kg/day)) is 2,400 to 6,000 times greater than the estimated dietary exposure from the pesticidal sources of gentamicin (0.001229 mg/kg/day). Therefore, because the pesticide exposure has no more than a minimal impact on the total dose to a pharmaceutical user, EPA believes that there is a reasonable certainty that the potential dietary pesticide exposure will result in no harm to a user being treated therapeutically with gentamicin. FDA has been made aware of EPA's conclusions regarding pesticide exposure in users receiving treatment with a pharmaceutical gentamicin drug product.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to gentamicin residues.

V. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no Codex maximum residue limits (MRLs) for residues of gentamicin on apples.

VI. Conclusion

Therefore, a time-limited tolerance is established for residues of gentamicin *per se*, in or on apple at 0.10 ppm. The tolerance expires and is revoked on December 31, 2010.

VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under sections 408(e) and 408(l)(6) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established in accordance with sections 408(e) and 408(l)(6) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VIII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 17, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.642 is added to read as follows:

§ 180.642 Gentamicin; tolerances for residues.

(a) *General*. [Reserved].

(b) *Section 18 emergency exemptions*. Time-limited tolerances specified in the following table are established for residues of gentamicin in or on the specified agricultural commodities, resulting from use of the pesticide pursuant to FIFRA section 18 emergency exemptions. The tolerances expire and are revoked on the date specified in the following table.

Commodity	Parts per million	Expiration/revocation date
Apple	0.10	December 31, 2010

(c) *Tolerance with regional restrictions*. [Reserved]

(d) *Indirect or inadvertent residues*. [Reserved]

[FR Doc. E8–17337 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2006–0857; FRL–8370–7]

Cyfluthrin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of cyfluthrin in or on alfalfa, forage and revises the existing tolerance for residues of cyfluthrin in or on alfalfa, hay. Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective July 30, 2008. Objections and requests for hearings must be received on or before September 29, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2006–0857. To access the electronic docket, go to *http://www.regulations.gov*, select ‘‘Advanced Search,’’ then ‘‘Docket Search.’’ Insert the docket ID number where indicated and select the ‘‘Submit’’ button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Susan Stanton, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5218; e-mail address: *stanton.susan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ‘‘**Federal Register**’’ listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2006–0857 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 29, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2006–0857, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of January 23, 2008 (73 FR 3964) (FRL–8345–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7F7226) by Bayer CropScience, 2.T.W. Alexander Drive, PO Box 12014, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.436 be amended by establishing tolerances for residues of the insecticide cyfluthrin, cyano(4-fluoro-3-phenoxyphenyl)methyl-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate, in or on alfalfa, forage at 5.0 parts per million (ppm) and alfalfa, hay at 15.0 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available to the public at *http://www.regulations.gov* in the docket established for that action (EPA–HQ–OPP–2007–0506). Comments were received on the notice of filing. EPA's response to these comments is discussed in Unit IV.C.

Based upon review of the data supporting the petition, EPA has revised the tolerance level for alfalfa, hay from 15.0 ppm to 13 ppm. The reason for this change is explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for residues of cyfluthrin on alfalfa, forage at 5.0 ppm and alfalfa, hay at 13 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

On February 27, 2008, the Agency published a final rule in the **Federal Register** (73 FR 10390) (FRL–8350–3) establishing tolerances for residues of cyfluthrin in or on grass, forage, fodder and hay group 17, forage at 12 ppm; grass, forage, fodder and hay, group 17, hay at 50 ppm; beet, sugar, roots at 0.10 ppm; and beet, sugar, dried pulp at 1.0 ppm. When the Agency conducted the risk assessments in support of the February 27, 2008 tolerance action, it considered the proposed use of cyfluthrin on alfalfa, incorporating potential residues of cyfluthrin in afalfa commodities and secondary residues of cyfluthrin in livestock commodities from consumption of treated feedstuffs, including alfalfa forage and hay. Since EPA considered the alfalfa use in its most recent risk assessments, establishing the tolerances on alfalfa forage and hay will not change the estimated aggregate risks resulting from use of cyfluthrin, as discussed in the February 27, 2008 **Federal Register**. Refer to this **Federal Register** document, available at *http://www.regulations.gov*, for a detailed discussion of the aggregate risk assessments and determination of safety. EPA relies upon those risk assessments and the findings made in the **Federal Register** document in support of this action.

Based on the risk assessments discussed in the final rule published in the **Federal Register** of February 27, 2008, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to cyfluthrin residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology using gas chromatography/electron-capture (GC/EC) detection is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no CODEX, Canadian or Mexican MRLs (maximum residue limits) established for cyfluthrin on alfalfa commodities.

C. Response to Comments

One comment was received from a private citizen in response to the notice of filing. The commenter stated ''We need to further explore this issue concerning the pesticide usage.'' The comment contained no scientific data or other substantive evidence to rebut the Agency's finding that there is a reasonable certainty that no harm will result from aggregate exposure to cyfluthrin from the establishment of these tolerances. In making this finding, EPA considered all available scientific data for cyfluthrin and the estimated aggregate exposure to the pesticide, including anticipated dietary (food and drinking water) and residential exposures. EPA, therefore, disagrees with the commenter that there is a need for further exploration.

D. Revisions to Petitioned-For Tolerances

Based upon review of the data supporting the petition, EPA has revised the tolerance level for alfalfa, hay from 15.0 ppm to 13 ppm. EPA revised the tolerance level based on analysis of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's *Guidance for Setting Pesticide Tolerances Based on Field Trial Data*.

V. Conclusion

Therefore, tolerances are established for residues of cyfluthrin, cyano(4-fluoro-3-phenoxyphenyl)methyl-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate, in or on alfalfa, forage at 5.0 ppm and alfalfa, hay at 13 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the

Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 16, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.436 is amended by revising the tolerance for alfalfa, hay and alphabetically adding the commodity alfalfa, forage to the table in paragraph (a)(1) to read as follows:

§ 180.436 Cyfluthrin; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
* * *	* *
Alfalfa, forage	5.0
Alfalfa, hay	13
* * *	* *

* * * * *

[FR Doc. E8–17062 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0214; FRL–8373–2]

Pyraclostrobin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for combined residues of pyraclostrobin and its desmethoxy metabolite in or on the following commodities: Borage, seed; castor oil plant, seed; chinese tallowtree, seed; crambe, seed; cuphea, seed; echium, seed; euphorbia, seed; evening primrose, seed; flax, seed; gold of pleasure, seed; hare's ear mustard, seed; jojoba, seed; lesquerella, seed; lunaria, seed; meadowfoam, seed; milkweed, seed; mustard, seed; niger seed, seed; oil radish, seed; poppy, seed; rapeseed, seed; rose hip, seed; safflower, seed; sesame, seed; stokes aster, seed; sweet rocket, seed; tallowwood, seed; tea oil plant, seed; and vernonia, seed. It also increases the existing tolerance for residues of pyraclostrobin and its desmethoxy metabolite in or on sunflower. BASF Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective July 30, 2008. Objections and requests for hearings must be received on or before September 29, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007-0214. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Tony Kish, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9443; e-mail address: *kish.tony@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0214 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before September 29, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–0214, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of June 13, 2008 (73 FR 33814) (FRL–8367–3), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 6F7105) by BASF Corporation, 26 Davis Dr., Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.582 be amended by establishing tolerances for combined residues of the fungicide pyraclostrobin; carbamic acid, [2-[[[1-(4-chlorophenyl)-1*H*-pyrazol-3-yl]oxy]methyl]phenyl]methoxy-, methyl ester and its desmethoxy metabolite; (methyl-*N*-[[[1-(4-chlorophenyl)-1*H*-pyrazol-3-yl]oxy]methyl]phenylcarbamate, expressed as parent compound, in or on borage; castor oil plant; chinese tallowtree; crambe; cuphea; echium; euphorbia; evening primrose; flax seed; gold of pleasure; hare's ear mustard; jojoba; lesquerella; lunaria; meadowfoam; milkweed; mustard seed; niger seed; oil radish; poppy seed; rapeseed; rose hip; safflower; sesame; stokes aster; sunflower; sweet rocket; tallowwood; tea oil plant; and vernonia; each at 0.45 parts per million (ppm). That notice referenced a summary of the petition prepared by BASF Corporation, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

No changes were made to the proposed tolerance levels; however, EPA modified the proposed commodity terms slightly (e.g., changing ''borage'' to ''borage, seed'', ''cuphea'' to ''cuphea, seed'', etc.) to conform to current nomenclature recommendations.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for combined residues of pyraclostrobin and its desmethoxy metabolite on borage, seed; castor oil plant, seed; chinese tallowtree, seed; crambe, seed; cuphea, seed; echium, seed; euphorbia, seed; evening primrose, seed; flax, seed; gold of pleasure, seed; hare's ear mustard, seed; jojoba, seed; lesquerella, seed; lunaria, seed; meadowfoam, seed; milkweed, seed; mustard, seed; niger seed, seed; oil radish, seed; poppy, seed; rapeseed, seed; rose hip, seed; safflower, seed; sesame, seed; stokes aster, seed; sunflower, seed; sweet rocket, seed; tallowwood, seed; tea oil plant, seed; and vernonia, seed; each at 0.45 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

On March 24, 2008 the Agency published a Final Rule (73 FR 15425, FRL–8355–4) establishing tolerances for residues of pyraclostrobin and its desmethoxy metabolite in or on avocado at 0.6 ppm; barley, grain at 1.4 ppm; canistel at 0.6 ppm; mango at 0.6 ppm; oat, grain at 1.2 ppm; oat, hay at 18 ppm; oat, straw at 15 ppm; papaya at 0.6 ppm; sapodilla at 0.6 ppm; sapote, black at 0.6 ppm; sapote, mamey at 0.6 ppm; and star apple at 0.6 ppm. When the Agency conducted the risk assessments in support of this tolerance action it assumed that pyraclostrobin residues would be present on all of the oilseed commodities requested in this petition as well as on all foods covered by the proposed and established tolerances. Residues on oilseeds were included because there was a pending petition for pyraclostrobin tolerances on oilseed commodities at the time. The decision to establish tolerances on oilseed commodities was deferred until now because the original notice of filing of this petition contained errors requiring revision and re-publication in the **Federal Register**. Since the oilseed commodities were included in the previous risk assessments, establishing the oilseed commodity tolerances will not change the most recent estimated aggregate risks resulting from use of pyraclostrobin, as discussed in the March 24, 2008 **Federal Register**. Refer to the March 24, 2008 **Federal Register** document, available at *http://www.regulations.gov*, for a detailed discussion of the aggregate risk assessments and determination of safety. EPA relies upon those risk assessments and the findings made in the **Federal Register** document in support of this action.

Based on the risk assessments discussed in the final rule published in the **Federal Register** of March 24, 2008 (73 FR 15425, FRL–8355–4), EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to pyraclostrobin residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methods (an Liquid chromatography/mass/spectrometry (LC/MS/MS) method (BASF Method D9808), and an high performance liquid chromatography/ultraviolet (HPLC/UV) method (BASF Method D9904)) are available to enforce the tolerance expression. The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

No CODEX, Canadian or Mexican maximum residue limits (MRLs) have been established for residues of pyraclostrobin on the oilseed commodities associated with this petition.

V. Conclusion

Therefore, tolerances are established for combined residues of pyraclostrobin carbamic acid, [2-[[[1-(4-chlorophenyl)-1*H*-pyrazol-3-yl]oxy]methyl]phenyl]methoxy-, methyl ester and its desmethoxy metabolite; methyl-*N*-[[[1-(4-chlorophenyl)-1*H*-pyrazol-3-yl]oxy]methyl]phenylcarbamate, expressed as parent compound, in or on borage, seed; castor oil plant, seed; chinese tallowtree, seed; crambe, seed; cuphea, seed; echium, seed; euphorbia, seed; evening primrose, seed; flax, seed; gold of pleasure, seed; hare's ear mustard, seed; jojoba, seed; lesquerella, seed; lunaria, seed; meadowfoam, seed; milkweed, seed; mustard, seed; niger seed, seed; oil radish, seed; poppy, seed; rapeseed, seed; rose hip, seed; safflower, seed; sesame, seed; stokes aster, seed; sweet rocket, seed; tallowwood, seed; tea oil plant, seed; and vernonia, seed; each at 0.45 ppm. The existing tolerance for combined residues of pyraclostrobin and its desmethoxy metabolite on sunflower at 0.3 ppm is revised to read "sunflower, seed" at 0.45 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995

(NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 10, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.582 is amended by revising the entry for sunflower to read sunflower, seed, and alphabetically adding the following commodities to the table in paragraph (a)(1) to read as follows:

§ 180.582 Pyraclostrobin; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
* * * * *	
Borage, seed	0.45
* * * * *	
Castor oil plant, seed	0.45
Chinese tallowtree, seed	0.45
* * * * *	
Crambe, seed	0.45
Cuphea, seed	0.45
Echium, seed	0.45
Euphorbia, seed	0.45
Evening primrose, seed	0.45
Flax, seed	0.45
* * * * *	
Gold of pleasure, seed	0.45
* * * * *	
Hare's ear mustard, seed	0.45
* * * * *	
Jojoba, seed	0.45
Lesquerella, seed	0.45
Lunaria, seed	0.45
* * * * *	
Meadowfoam, seed	0.45
Milkweed, seed	0.45
Mustard, seed	0.45
Niger seed, seed	0.45
* * * * *	
Oil radish, seed	0.45
* * * * *	
Poppy, seed	0.45
* * * * *	
Rapeseed, seed	0.45
Rose hip, seed	0.45
* * * * *	
Safflower, seed	0.45
* * * * *	
Sesame, seed	0.45
* * * * *	
Stokes aster, seed	0.45
* * * * *	
Sunflower, seed	0.45
Sweet rocket, seed	0.45
Tallowwood, seed	0.45
Tea oil plant, seed	0.45
* * * * *	
Vernonia, seed	0.45
* * * * *	

* * * * *

[FR Doc. E8–17480 Filed 7–29–08; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–RO3–RCRA–2008–0256: FRI–8698–9]

Virginia: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Virginia applied to EPA for final authorization of revisions to its hazardous waste program under Resource Conservation and Recovery Act (RCRA). EPA has reached a final determination that these changes to the Virginia hazardous waste program satisfy all requirements necessary for final authorization. Thus, with respect to these revisions, EPA is granting final authorization to the Commonwealth to operate its program subject to the limitations on its authority retained by EPA in accordance with RCRA.

DATES: Final authorization for the revisions to Virginia's hazardous waste management program shall be effective on July 30, 2008.

FOR FURTHER INFORMATION CONTACT: E-mail: Thomas UyBarreta, *uybarreta.thomas@epa.gov*; Mail: Thomas UyBarreta, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103–2029; Phone: 215–814–2953.

A. Why Are Revisions to State Programs Necessary?

States that have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program is revised, States must revise their programs and ask EPA to authorize the revisions. Revisions to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must revise their programs because of revisions to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273 and 279.

On October 10, 2007, Virginia submitted to EPA a complete program revision application, in accordance with 40 CFR 271.21, seeking authorization of additional changes to its program. On April 3, 2008, EPA published both an immediate final rule (73 FR 18172–18176) granting Virginia final authorization for these revisions to its federally-authorized hazardous waste program, along with a companion proposed rule announcing EPA's proposal to grant such final authorization (73 FR 18229–18230). EPA announced in both notices that the immediate final rule and the proposed rule were subject to a thirty-day public comment period. The public comment period ended on May 5, 2008. Further, EPA stated in both notices that if it received adverse comments on its intent to authorize Virginia's program revisions that it would (1) withdraw the immediate final rule; (2) proceed with the proposed rule as the basis for the receipt and evaluation of such comments, and (3) subsequently publish a final determination responding to such comments and announce its final decision whether or not to authorize Virginia's program revisions. EPA did receive a written comment during the public comment period and on June 3, 2008, published a notice withdrawing the immediate final rule (73 FR 31634). Today's action responds to the comments EPA received and publishes EPA's final determination granting Virginia final authorization of its program revisions. Further background on EPA's immediate final rule and its tentative determination to grant authorization to Virginia for its program revisions appears in the aforementioned **Federal Register** notices. The issues raised by the commenter are summarized and responded to as follows.

B. What Were the Comments and Responses to EPA's Proposal?

EPA received two comments from an individual opposing EPA's proposal to authorize revisions to Virginia's hazardous waste regulations. The commenter opposed authorization of the regulations that adopted the rules that were promulgated under non-HSWA authority, including the RCRA Burden Reduction Initiative (Revision Checklist 213).[1] The commenter argued that, through RCRA, Congress has barred EPA and authorized states from promulgating regulations that are less stringent than the regulations that were first promulgated under the authority of RCRA. Specifically, the commenter stated that 42 U.S.C. 6929 would prevent EPA from amending 40 CFR 268.7(b)(6) to eliminate the requirement to submit notifications and certifications to EPA; this amendment, argued the commenter, prohibits states from requiring that the State be provided with copies of hazardous waste manifests, and such prohibition is not allowed by 42 U.S.C. 6929. For the reasons set forth below, we do not agree with the commenter.

EPA promulgated all of the rules included in Virginia's revision pursuant to the authority granted to EPA by Congress under RCRA. Those rules, including the RCRA Burden Reduction Initiative Rule, were finalized after full consideration of any and all comments submitted in a timely manner. By adopting the rules promulgated by EPA, Virginia revised its hazardous waste program to be equivalent to and consistent with the federal program. Pursuant to 42 U.S.C. 6926(b), EPA has the authority to authorize state programs that are equivalent to and consistent with the federal program. Additionally, as is explained in more detail in the RCRA Burden Reduction Initiative Final Rule (71 FR 16862), EPA's amendment of 40 CFR 268.7(b)(6) does not prohibit any state from requiring that the state be provided with copies of hazardous waste manifests. States are not required to adopt and seek authorization for federal requirements that are equivalent to, or less stringent than, the state's currently authorized regulations (*see* 71 FR at 16899). Specifically, although several states had commented positively regarding the amendment to 40 CFR 268.7(b)(6), EPA explained that any state ''may choose to be more stringent than the federal program, and choose to retain these notifications.'' (71 FR at 16889)

The commenter also stated that some of the Revision Checklists for the nine RCRA clusters for which Virginia is seeking authorization ''erroneously suggest that the Attorney General may not need to conduct a detailed review of the proposed rules against state statute for authority prior to final authorization.'' As a result, the commenter expressed concern ''that there may not have been an in-depth Attorney General review as required'' by 40 CFR 271.7. EPA responds to this comment as follows.

Pursuant to 40 CFR 271.21(b)(1), in order to revise its program, a state must submit ''such * * * documents as EPA determines to be necessary under the circumstances.'' These documents may include a modified Attorney General's

[1] The commenter incorrectly stated that the entire RCRA Burden Reduction Initiative was promulgated pursuant to non-HSWA authority. In fact, the RCRA Burden Reduction Initiative was promulgated pursuant to both HSWA and non-HSWA statutory authority.

Statement. The purpose of the Attorney General's Statement, as described in 40 CFR 271.7, is to demonstrate to EPA that the state has the legal authority to carry out the program. In each of the revision checklist summaries for the revisions at issue in this authorization, EPA states that ''specific [Attorney General] certification of statutory authority may not be required for this checklist as long as the [Attorney General] has previously demonstrated authority for * * *'' the area that is being regulated in the rule at issue, such as generators, identification and listing of hazardous waste, or the hazardous waste manifest. This statement, as included in the checklist summaries, is appropriate because a state that has already certified that it has the authority to regulate a certain area may not need to make that certification once again if the authority has not changed. Nevertheless, in this case, Virginia did submit to EPA an Attorney General's Statement of Adequate Authority, in accordance with 40 CFR 271.7, as part of its application for revision of its hazardous waste regulations.

C. What Decisions Have We Made in This Rule?

Based on EPA's response to public comment, the Agency has determined that approval of Virginia's RCRA program revisions should proceed. EPA has made a final determination that Virginia's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant Virginia final authorization to operate its hazardous waste program with the changes described in its application for program revisions.

The effect of this decision is that a facility in Virginia subject to RCRA will have to comply with the authorized revised State requirements instead of the equivalent Federal requirements in order to comply with RCRA. While Virginia has enforcement responsibilities under its State hazardous waste program for violations of such program, EPA nevertheless retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Take enforcement actions regardless of whether the State has taken its own actions;
- Enforce RCRA requirements and suspend or revoke permits; and
- Perform inspections, and require monitoring, tests, analyses or reports.

This action does not impose additional requirements on the regulated community because the regulations for which Virginia is being authorized by today's action are already effective, and are not changed by today's action.

D. Administrative Requirements

The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. This action authorizes State requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this action would not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). In any case, Executive Order 13175 does not apply to this rule since there are no Federally recognized tribes in the Commonwealth of Virginia.

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely authorizes State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks that may disproportionately affect children. This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings issued under the executive order. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2); as a result, this action will be effective July 30, 2008.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Indians—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: July 21, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8–17456 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 94–129; FCC 07–223]

Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's *Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Fourth Report and Order (*2007 Fourth Report and Order*). This notice is consistent with the *2007 Fourth Report and Order*, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of the rule.

DATES: Section 64.1120(c)(3)(iii), published at 73 FR 13144, March 12, 2008 is effective July 30, 2008.

FOR FURTHER INFORMATION CONTACT: David Marks, Consumer Policy Division, Consumer & Governmental Affairs Bureau, at (202) 418–0347.

SUPPLEMENTARY INFORMATION: This document announces that, on July 14, 2008, OMB approved, for a period of three years, the information collection requirements contained in the Commission's *2007 Fourth Report and Order*, FCC 07–223, published at 73 FR 13144, March 12, 2008. The OMB Control Number is 3060–0787. The Commission publishes this notice as an announcement of the effective date of the rule. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554. Please include the OMB Control Number, 3060–0787, in your correspondence. The Commission will also accept your comments via the Internet if you send them to *PRA@fcc.gov*.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on July 14, 2008, for the information collection requirements contained in the Commission's rules at 47 CFR 64.1120(c)(3)(iii). The OMB Control Number is 3060–0787. The total annual reporting burden for respondents for these collections of information, including the time for gathering and maintaining the collection of information, is estimated to be: 6,454 respondents, a total annual hourly burden of 105,901 hours, and $51,285,000 in total annual costs.

Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act, which does not display a current, valid OMB Control Number. The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–17459 Filed 7–29–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 03–123; FCC 07–186]

Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order and Declaratory Ruling (*2007 TRS Cost Recovery Order*). This notice is consistent with the *2007 TRS Cost Recovery Order,* which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of the rule.

DATES: Section 64.604(c)(5)(iii)(C), published at 73 FR 3197, January 17, 2008, is effective July 30, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Chandler, Disabilities Rights Office, Consumer and Governmental Affairs Bureau, at (202) 418–1475.

SUPPLEMENTARY INFORMATION: This document announces that, on July 20, 2008, OMB approved, for a period of three years, the information collection requirements contained in the Commission's *2007 TRS Cost Recovery Order,* FCC 07–186, published at 73 FR 3197, January 17, 2008. The OMB Control Number is 3060–0463. The Commission publishes this notice as an announcement of the effective date of the rule. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554. Please include the OMB Control Number, 3060–0463, in your correspondence. The Commission will also accept your comments via the Internet if you send them to *PRA@fcc.gov*.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on July 20, 2008, for the information collection requirements contained in the Commission's rules at 47 CFR 64.604(c)(5)(iii)(C). The OMB Control Number is 3060–0463. The total annual reporting burden for respondents for these collections of information, including the time for gathering and maintaining the collection of information, is estimated to be: 5,045 respondents, a total annual hourly burden of 27,412 hours, and $0 in total annual costs.

Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act, which does not display a current, valid OMB Control Number.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–17348 Filed 7–29–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385 and 395

[Docket No. FMCSA–2004–19608]

RIN 2126–AB14

Hours of Service of Drivers; Availability of Supplemental Documents

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of availability of supplemental documents.

SUMMARY: This notice advises the public that FMCSA is placing in the public docket four additional documents concerning hours of service (HOS) for commercial motor vehicle drivers. FMCSA published an interim final rule (IFR) on this issue on December 17, 2007. The Agency now dockets the supplemental documents.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations. Telephone (202) 366–4325 or E-mail *MCPSD@dot.gov.* Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: On August 25, 2005, FMCSA published a final HOS rule (''2005 rule'') (70 FR 49978). On July 24, 2007, the D.C. Circuit Court vacated the 11-hour driving time and 34-hour restart provisions of the 2005 rule (*Owner-Operator Independent Drivers Association, Inc.* v. *Federal Motor Carrier Safety Administration,* 494 F.3d 188 (D.C. Cir. 2007)). In response to the D.C. Circuit Court decision, FMCSA published an interim final rule (IFR) on December 17, 2007 (72 FR 71247) that reinstated the two provisions vacated by the Court and sought further comments on those provisions.

For a full background on this rulemaking, please see the preamble to the December 2007 HOS IFR. The docket for this rulemaking (FMCSA–2004–19608) contains all of the background information for this rulemaking, including comments.

This notice calls attention to four additional supplemental documents. FMCSA places the following four electronic files in the docket at FMCSA–2004–19608–3488:

- ''HOS Model Description and Guide.doc'' (149 kilobytes) A description of the FMCSA HOS Simulation Computer Model and instructions for its use.
- ''HOS Simulation Model Sleeper.xls'' (34 megabytes (MB)) An FMCSA HOS Simulation Computer Model including sleeper-berth use.
- ''HOS Simulation Model No Sleeper.xls'' (33 MB) An FMCSA HOS Simulation Computer Model excluding sleeper-berth use.
- ''HOS Simulation Model Outputs.xls'' (6.4 MB) A subset of outputs from the FMCSA HOS Simulation Computer Model, showing details of calculations as used in the 2007 Regulatory Impact Analysis in Docket Item FMCSA–2004–19608–2529.''

The HOS Computer Simulation Program is a complex FMCSA computer model simulating the movements of a single vehicle (with one or two drivers and in different scenarios) operated in compliance with the FMCSA HOS regulations. This model was used in the 2007 Regulatory Impact Analysis and is Docket Item FMCSA–2004–19608–2529. The HOS requirements may be modified by the simulation program user, allowing the model to analyze various types of HOS options to show the marginal impact on driver productivity, which could be translated into cost effects. The computer model uses the Visual Basic programming language to operate a macro-driven Microsoft Excel(™) spreadsheet.

Issued on: July 23, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–17409 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 070717340–8451–02]

RIN 0648–AP60

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 9; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; correction.

SUMMARY: On July 1, 2008, a final rule to implement Amendment 9 to the Atlantic Mackerel, Squid, and Butterfish (MSB) Fishery Management Plan (FMP) was published in the **Federal Register**. The final rule was published with one error. Instead of revising the introductory text for the regulations describing squid and butterfish moratorium permits, the amendatory instructions of the final rule inadvertently revised the entire section. This document corrects that error.

DATES: Effective July 31, 2008.

FOR FURTHER INFORMATION CONTACT: Carrie Nordeen, Fishery Policy Analyst, (978) 281–9272, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2008 (73 FR 37382), a final rule was published implementing Amendment 9 to the MSB FMP (Amendment 9). Amendment 9 established multi-year specifications for all four species managed under the FMP (mackerel, butterfish, *Illex* squid, and *Loligo* squid) for up to 3 years; extended the moratorium on entry into the *Illex* squid fishery, without a sunset provision; adopted biological reference points recommended by the Stock Assessment Review Committee for *Loligo* squid; designated essential fish habitat (EFH) for *Loligo* squid eggs based on best available scientific information; and prohibited bottom trawling by MSB-permitted vessels in Lydonia and Oceanographer Canyons. The amendatory instructions for the final rule implementing Amendment 9 contained an error. Instead of revising the introductory text for the regulations describing squid and butterfish moratorium permits, the amendatory instructions for the final rule inadvertently revised the entire section. This document corrects this error.

Correction

Accordingly, the final rule, published on July 1, 2008, at 73 FR 37382, to be effective July 31, 2008, is corrected as follows:

1. On page 37388, in column 1, correct the second amendatory instruction to read: ''2. In § 648.4, the introductory text for paragraph (a)(5)(i) is revised to read as follows:''

Dated: July 25, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. E8–17468 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106671–8010–02]

RIN 0648–XJ35

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch for Trawl Catcher Vessels Participating in the Rockfish Entry Level Fishery in the Central Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2008 total allowable catch (TAC) of Pacific ocean perch allocated to trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 27, 2008, through 1200 hrs, A.l.t., September 1, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

In accordance with § 679.83(a)(1)(i), allocations of entry level rockfish to trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area are first made from the Pacific ocean perch TAC. NMFS has determined that the 2008 TAC of Pacific ocean perch allocated to the entry level fishery meets or exceeds the total allocation of rockfish allowable for the trawl catcher vessels. Therefore, the 2008 TAC of Pacific ocean perch allocated to trawl catcher vessels participating in the entry level rockfish fishery in the Central Regulatory Area is 345 mt as established by the 2008 and 2009 final harvest specifications for groundfish in the GOA (73 FR 10562, February 27, 2008), and as posted as the 2008 Rockfish Program Allocations at *http://www.fakr.noaa.gov/sustainablefisheries/goarat/default.htm.*

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2008 TAC of Pacific ocean perch allocated to trawl catcher vessels participating in the entry level rockfish fishery in the Central Regulatory Area will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 345 mt, and is setting aside the remaining 0 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch allocated to trawl catcher vessels participating in the entry level rockfish fishery in the Central Regulatory Area of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific ocean perch by trawl catcher vessels participating in the rockfish entry level fishery in the Central Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 24, 2008.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and § 679.83 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 25, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 08–1474 Filed 7–25–08; 2:33 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106671–8010–02]

RIN 0648–XJ36

Fisheries of the Exclusive Economic Zone Off Alaska; Northern Rockfish for Catcher Processors Participating in the Rockfish Limited Access Fishery in the Central Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for northern rockfish by catcher processors participating in the rockfish limited access fishery in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2008 total allowable catch (TAC) of northern

rockfish allocated to catcher processors participating in the rockfish limited access fishery in the Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 25, 2008, through 2400 hrs, A.l.t., December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 TAC of northern rockfish allocated to catcher processors participating in the rockfish limited access fishery in the Central GOA is 514 metric tons (mt) as established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008), and as posted as the 2008 Rockfish Program Allocations at *http://www.fakr.noaa.gov/sustainablefisheries/goarat/default.htm*.

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2008 TAC of northern rockfish allocated to catcher processors participating in the rockfish limited access fishery in the Central GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 514 mt, and is setting aside the remaining 0 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for northern rockfish by catcher processors participating in the rockfish limited access fishery in the Central GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of northern rockfish by catcher processors participating in the rockfish limited access fishery in the Central GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 24, 2008.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 25, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 08–1477 Filed 7–25–08; 3:29 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106673–8011–02]

RIN 0648–XJ32

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Atka Mackerel in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of the 2008 incidental catch allowance (ICA) of Atka mackerel to the B season allowance of Atka mackerel for the Amendment 80 cooperative in the Eastern Aleutian District and the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the 2008 total allowable catch of Atka mackerel to be fully harvested.

DATES: Effective July 29, 2008, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 ICA of Atka mackerel is 1,400 metric tons (mt) and the B season allowance of Atka mackerel for the Amendment 80 cooperative is 3,692 mt in the Eastern Aleutian District and the Bering Sea subarea of the BSAI as established by the 2008 and 2009 final harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008).

The Administrator, Alaska Region, NMFS, has determined that 1,300 mt of the ICA will not be harvested. Therefore, in accordance with § 679.20(a)(8)(v)(B), NMFS apportions 1,300 mt of Atka mackerel from the ICA to the B season allowance of Atka mackerel for the Amendment 80 cooperative in the Eastern Aleutian District and the Bering Sea subarea of the BSAI. In accordance with § 679.91(f), NMFS will reissue cooperative quota permits for the reallocated Atka mackerel following the procedures set forth in § 679.91(f)(3).

The harvest specifications for Atka mackerel included in the harvest specifications for groundfish in the BSAI (73 FR 10160, February 26, 2008) are revised as follows: 100 mt to the ICA and 4,992 mt to B season allowance of Atka mackerel for the Amendment 80 cooperative in the Eastern Aleutian District and the Bering Sea subarea of the BSAI. Table 4 is correctly revised and republished in its entirety as follows:

TABLE 4—2008 AND 2009 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC

[Amounts are in metric tons]

Sector[1]	Season[2,3]	2008 allocation by area			2009 allocation by area		
		Eastern Aleutian District/ Bering Sea	Central Aleutian District	Western Aleutian District	Eastern Aleutian District/ Bering Sea	Central Aleutian District	Western Aleutian District
TAC	n/a	19,500	24,300	16,900	15,300	19,000	13,200
CDQ reserve	Total HLA[4]	2,087 n/a	2,600 1,560	1,808 1,085	1,637 n/a	2,033 1,220	1,412 847
ICA	Total	100	10	10	1,400	10	10
Jig[5]	Total	80	0	0	61	0	0
BSAI trawl limited access	Total	319	434	0	488	678	0
	A HLA[4]	159 n/a	217 130	0 0	244 n/a	339 203	0 0
	B HLA[4]	159 n/a	217 130	0 0	244 n/a	339 203	0 0
Amendment 80 sectors	Total	15,615	21,256	15,082	12,202	16,957	11,778
	A HLA[4]	7,807 4,684	10,628 6,377	7,541 4,525	6,101 3,660	8,479 5,087	5,889 3,533
	B HLA[4]	7,807 4,684	10,628 6,377	7,541 4,525	6,101 3,660	8,479 5,087	5,889 3,533
Amendment 80 limited access	Total	8,232	12,809	9,298	n/a	n/a	n/a
	A HLA[4]	4,116 n/a	6,405 3,843	4,649 2,789	n/a n/a	n/a n/a	n/a n/a
	B HLA[4]	4,116 n/a	6,405 3,843	4,649 2,789	n/a n/a	n/a n/a	n/a n/a
Amendment 80 cooperatives	Total	8,804	8,447	5,784	n/a	n/a	n/a
	A HLA[4]	3,812 n/a	4,224 2,534	2,892 1,735	n/a n/a	n/a n/a	n/a n/a
	B HLA[4]	4,992 n/a	4,224 2,534	2,892 1,735	n/a n/a	n/a n/a	n/a n/a

[1] Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs, after subtraction of the CDQ reserves, jig gear allocation, and ICAs, to the Amendment 80 and BSAI trawl limited access sectors. The allocation of the ITAC for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in Table 33 to part 679 and § 679.91. The CDQ reserve is 10.7 percent of the TAC for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C) and 679.31).

[2] Regulations at §§ 679.20(a)(8)(ii)(A) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery. The A season is January 1 (January 20 for trawl gear) to April 15 and the B season is September 1 to November 1.

[3] The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.

[4] Harvest Limit Area (HLA) limit refers to the amount of each seasonal allowance that is available for fishing inside the HLA (see § 679.2). In 2008 and 2009, 60 percent of each seasonal allowance is available for fishing inside the HLA in the Western and Central Aleutian Districts.

[5] Section 679.20(a)(8)(i) requires that up to 2 percent of the Eastern Aleutian District and the Bering Sea subarea TAC be allocated to jig gear after subtraction of the CDQ reserve and ICA. The amount of this allocation is 0.5 percent. The jig gear allocation is not apportioned by season.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Atka mackerel from the ICA to the Amendment 80 cooperative in the Eastern Aleutian District and the Bering Sea subarea of the BSAI. Since the fishery is currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 23, 2008.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 25, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–17466 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 73, No. 147

Wednesday, July 30, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1150

[Docket No. AMS DA–08–0035; DA–08–02]

National Dairy Promotion and Research Program; Invitation To Submit Comments on Proposed Amendments to the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document invites comments on a proposed amendment to the Dairy Promotion and Research Order (Dairy Order). The proposal would modify the composition of the National Dairy Promotion and Research Board (Dairy Board) by changing the number of member seats in six of the 13 geographic regions. This modification was requested by the Dairy Board, which administers the Dairy Order, to better reflect the geographic distribution of milk production in the 48 contiguous States. The Department will issue a final rule once public comments have been received and considered.

DATES: Comments must be submitted on or before August 14, 2008.

ADDRESSES: Comments on this proposed rule should be identified with the docket number AMS–DA–08–0035; DA–08–02. Commenters should identify the date and page number of the issue of the Proposed Rule. Interested persons may comment on this proposed rule using either of the following procedures:

• *Mail:* Comments may be submitted by mail to Whitney A. Rick, Chief, Promotion and Research Branch, Dairy Programs, AMS, USDA, 1400 Independence Ave., SW., Room 2958–S, Stop 0233, Washington, DC 20250–0233.

• *Internet: http://www.regulations.gov.*

All comments to this proposed rule, submitted by the above procedures will be available for viewing at: *http://www.regulations.gov,* or at USDA, AMS, Dairy Programs, Promotion and Research Branch, Room 2958–S, 1400 Independence Ave., SW., Washington, DC, from 9 a.m. to 4 p.m., Monday through Friday, (except on official Federal holidays). Persons wanting to view comments in Room 2958–S are requested to make an appointment in advance by calling (202) 720–6909.

FOR FURTHER INFORMATION CONTACT: Whitney A. Rick, Chief, Promotion and Research Branch, Dairy Programs, AMS, USDA, 1400 Independence Ave., SW., Room 2958–S, Stop 0233, Washington, DC 20250–0233. Phone: (202) 720–6909. E-mail: *Whitney.Rick@usda.gov.*

SUPPLEMENTARY INFORMATION: This proposed rule is issued pursuant to the Dairy Production Stabilization Act (Act) of 1983 [7 U.S.C. 4501–4514].

Executive Order 12866

The Office of Management and Budget has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have a retroactive effect. If adopted, this rule would not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

The Dairy Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 4509 of the Dairy Act, any person subject to the Dairy Order may file with the Secretary a petition stating that the Dairy Order, any provision of the Dairy Order, or any obligation imposed in connection with the Dairy Order is not in accordance with the law and request a modification of the Dairy Order or to be exempted from the Dairy Order. Such person is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Dairy Act provides that the district court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act

The Agricultural Marketing Service (AMS) has determined that this rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612).

For the purpose of the Regulatory Flexibility Act, small businesses in the dairy industry have been defined as those employing less than 500 employees. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000. In the 48 contiguous States, there are approximately 70,000 dairy farms subject to the provisions of this Dairy Order. Most of the parties subject to the Dairy Order are considered small entities.

The proposed rule would amend the Dairy Order by modifying the number of member seats on the Dairy Board in six of the 13 geographic regions. The proposed amendment is being made to better reflect the geographic distribution of milk produced within each of the 13 regions of the contiguous 48 States.

The Dairy Order is administered by a 36-member Board representing 13 geographic regions within the contiguous 48 States. The Dairy Order provides that the Dairy Board shall review the geographic distribution of milk production throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of the regions and/or modification of the number of members from regions in order to better reflect the geographic distribution of milk production volume in the 48 contiguous States.

Based on a review of the 2007 geographic distribution of milk production, the Dairy Board has concluded that the number of Dairy Board members for six of the 13 geographical regions should be changed. The Dairy Board was last modified in 2003 based on 2002 milk production.

The proposed amendment should not have a significant economic impact on persons subject to the Dairy Order. The proposed changes merely would allow representation of the Dairy Board to better reflect geographic milk production in the contiguous 48 States.

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. chapter 35], the information collection requirements and recordkeeping provisions imposed by the Dairy Order have been previously approved by OMB and assigned OMB Control No. 0581–0093. No relevant Federal rules have been identified that duplicate, overlap, or conflict with this rule.

Statement of Consideration

The Dairy Order is administered by a 36-member Dairy Board representing 13 geographic regions within the contiguous 48 States. The Dairy Order provides in section 1150.131 that the Dairy Board shall review the geographic distribution of milk production volume throughout the contiguous 48 States and, if warranted, shall recommend to the Secretary a reapportionment of the regions and/or modification of the number of members from regions in order to best reflect the geographic distribution of milk production in the contiguous 48 States. The Dairy Board is required to conduct the review at least every five years and not more than every three years. The Dairy Board was last modified in 2003 based on 2002 milk production.

Based on a review of the 2007 geographic distribution of milk production, the Dairy Board has concluded that the number of Dairy Board members for six of the 13 geographic regions should be changed.

The Dairy Order specifies the formula to be used to determine the number of Dairy Board seats in each of the 13 geographic regions designated in the Dairy Order. Under the formula, the total milk production for the contiguous 48 states for the previous calendar year is divided by 36 to determine a factor of pounds of milk represented by each Dairy Board member. The resulting factor is then divided into the pounds of milk produced in each region to determine the number of Dairy Board members for each region. Accordingly, the following table summarizes by region the volume of milk production distribution for 2007, the percentage of total milk production, the current number of Dairy Board seats per region, and the proposed number of Dairy Board seats for each region.

Region and States	Milk production (mil lbs)	Percentage of total milk production	Current number of board seats	Proposed number of board seats
1. Oregon, Washington	7,764	4.2	2	1
2. California	40,683	21.9	7	8
3. Arizona, Colordao, Idaho, Montana, Nevada, Utah, Wyoming	21,212	11.4	3	4
4. Arkansas, Kansas, New Mexico, Oklahoma, Texas	18,200	9.8	3	4
5. Minnesota, North Dakota, South Dakota	10,741	5.8	2	2
6. Wisconsin	24,080	13.0	5	5
7. Illinois, Iowa, Missouri, Nebraska	8,948	4.8	2	2
8. Alabama, Kentucky, Louisiana, Mississippi, Tennessee	3,119	1.7	1	1
9. Indiana, Michigan, Ohio, West Virginia	16,148	8.7	3	3
10. Florida, Georgia, North Carolina, South Carolina, Virginia	6,506	3.5	1	1
11. Delaware, Maryland, New Jersey, Pennsylvania	12,008	6.5	3	2
12. New York	12,103	6.5	3	2
13. Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	4,046	2.2	1	1
Total: 48 Contiguous States	185,558	100	36	36

* Based upon preliminary 2007 NASS milk production data, February 2008.

In 2007, total milk production was 185,558 million pounds and each of the Dairy Board members would represent 5,154 million pounds of milk. For 2002, total milk production was 169,643 million pounds of milk and each of the Board members represented 4,712 million pounds of milk.

Based on the 2007 milk production data, the Dairy Board proposes that member representation in Region 2 (California), Region 3 (Arizona, Colorado, Idaho, Montana, Nevada, Utah, and Wyoming), and Region 4 (Arkansas, Kansas, New Mexico, Oklahoma, and Texas) each be increased by one member, and member representation in Region 1 (Oregon and Washington), Region 11 (Delaware, Maryland, New Jersey, and Pennsylvania), and Region 12 (New York) each be decreased by one member.

Milk production in Region 2 increased to 40,683 million pounds in 2007, up from 34,884 million pounds in 2002, indicating eight Dairy Board members (40,683 divided by 5,154 = 8) compared to seven Dairy Board members based on 2002 milk production data. Milk production in Region 3 increased to 21,212 million pounds in 2007, up from 16,291 million pounds in 2002, indicating four Dairy Board members (21,212 divided by 5,154 = 4) compared to three Dairy Board members based on 2002 milk production data. Milk production in Region 4 increased to 18,200 million pounds in 2007, up from 15,313 million pounds in 2002, indicating four Dairy Board members (18,200 divided by 5,154 = 4) compared to three Dairy Board members based on 2002 milk production data.

Milk production in Region 1 increased to 7,764 million pounds in 2007, up from 7,713 million pounds in 2002. The Dairy Board has determined that Region 1 milk production data does not continue to support 2 seats. Based on the data, the Dairy Board is recommending that one seat from Region 1 be assigned to another region, thereby reducing Region 1 Dairy Board members from two members to one member. In Region 11, milk production decreased to 12,008 million pounds in 2007 down from 12,492 million pounds in 2002, indicating two Dairy Board members for the region (12,008 divided by 5,154 = 2) compared to three members based on 2002 data. Also, in Region 12, milk production decreased to 12,103 million pounds in 2007 down from 12,217 million pounds in 2002, indicating two Dairy Board members for the region (12,103 divided by 5,154 = 2) compared to three members based on 2002 data.

Accordingly, it is proposed that member representation in Region 2 be increased from seven members to eight members, and Region 3 and Region 4 representation each be increased from three members to four members; Region 1 representation be decreased from two members to one member and Region 11 and Region 12 representation each be decreased from three members to two members.

A 15-day comment period is provided for interested persons to comment on this proposed rule. Twelve terms of existing Dairy Board members will expire on October 31, 2008. Thus, a 15-day comment period is provided to allow for a timely appointment of new Dairy Board members based on the current geographic distribution of milk production in the contiguous 48 States.

List of Subjects in 7 CFR Part 1150

Dairy Products, Milk, Promotion, Research.

For the reasons set forth in the preamble, it is proposed that 7 CFR part 1150 be amended as follows:

PART 115—Dairy Promotion Program

1. The authority citation for 7 CFR part 1150 continues to read as follows:

Authority: 7 U.S.C. 4501–4514 and 7 U.S.C. 7401

2. In § 1150.131, paragraphs (a)(1), (a)(2), (a)(3), (a)(4), (a)(11), and (a)(12) are revised as follows:

§ 1150.131 Establishment and membership.

(a) * * *

(1) One member from region number one comprised of the following States: Washington and Oregon.

(2) Eight members from region number two comprised of the following State: California.

(3) Four members from region number three comprised of the following States: Arizona, Colorado, Idaho, Montana, Nevada, Utah and Wyoming.

(4) Four members from region number four comprised of the following States: Arkansas, Kansas, New Mexico, Oklahoma and Texas.

* * * * *

(11) Two members from region number eleven comprised of the following States: Delaware, Maryland, New Jersey and Pennsylvania.

(12) Two members from region number twelve comprised of the following State: New York.

* * * * *

Dated: July 24, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 08–1469 Filed 7–24–08; 3:37 pm]

BILLING CODE 3410–02–P

DEPARTMENT OF JUSTICE

8 CFR Parts 1001, 1003, 1292

[Docket No. EOIR 160P; A.G. Order No. 2980–2008]

RIN 1125–AA59

Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Proposed rule with request for comments.

SUMMARY: This rule proposes to change the rules and procedures concerning the standards of representation and professional conduct for attorneys and other practitioners who appear before the Executive Office for Immigration Review (EOIR), which includes the immigration judges and the Board of Immigration Appeals (Board), and to clarify who is authorized to represent and appear on behalf of individuals in proceedings before the Board and the immigration judges. Current regulations set forth who may represent individuals in proceedings before EOIR and also set forth the rules and procedures for imposing disciplinary sanctions against attorneys or other practitioners who engage in criminal, unethical, frivolous, or unprofessional conduct before EOIR. The proposed revisions would increase the number of grounds for discipline and improve the clarity and uniformity of the existing rules while incorporating miscellaneous technical and procedural changes. The changes proposed herein are based upon the Attorney General's recent initiative for improving the adjudicatory processes for the immigration judges and the Board, as well as EOIR's operational experience in administering the disciplinary program since the current process was established in 2000.

DATES: Written comments must be submitted on or before September 29, 2008.

ADDRESSES: Please submit written comments to John N. Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia, 22041. To ensure proper handling, please reference RIN No. 1125–AA59 or EOIR docket number 160P on your correspondence. You may view an electronic version and provide comments via the Internet by using the *www.regulations.gov* comment form for this regulation. When submitting comments electronically, you must include RIN No. 1125–AA59 in the subject box. Additional information regarding the posting of public comments is in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: John N. Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia, 22041, telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http://www.regulations.gov.*

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

This rule proposes to amend 8 CFR parts 1001, 1003, and 1292 by changing the present definitions and procedures concerning professional conduct for practitioners, which term includes attorneys and representatives, who practice before the Executive Office for Immigration Review (EOIR). The proposed rule seeks to implement measures in response to the Attorney General's recent assessment of the Board of Immigration Appeals (Board) and the Immigration Courts with respect to the authority that each tribunal utilizes in disciplining and deterring professional misconduct. The proposed rule also aims to improve EOIR's ability to effectively regulate practitioner conduct by implementing technical changes with respect to the definition of attorney and clarifying who is authorized to represent and appear on behalf of individuals in proceedings before the Board and the immigration judges.

The final regulations concerning representation and appearances were last promulgated on May 1, 1997 (62 FR 23634). The regulations for the rules and procedures concerning professional conduct were last promulgated as a final rule on June 27, 2000 (65 FR 39513). The professional conduct final rule outlined the authority of the EOIR General Counsel to investigate complaints and pursue disciplinary sanctions against attorneys and other practitioners who appear before the immigration judges and the Board and revised the process for the adjudication of those complaints. As a result, the EOIR General Counsel is now responsible for enforcing the prohibition against criminal, unethical, unprofessional and frivolous conduct occurring before the immigration judges and the Board. *See Professional Conduct for Practitioners—Rules and Procedures,* 65 FR 39513 (June 27, 2000).

The former Immigration and Naturalization Service (INS) incorporated by reference in its regulations EOIR's grounds for discipline and procedures for disciplinary proceedings. INS did so when both it and EOIR were part of the Department of Justice. Since the promulgation of the final professional conduct rule in June of 2000, the functions of the former INS were transferred from the Department of Justice to the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002, Public Law No. 107–296, 116 Stat. 2135, 2178 (Nov. 25, 2002), as amended (codified primarily at 6 U.S.C. 101 *et seq.*). Accordingly, the Attorney General reorganized title 8 of the Code of Federal Regulations, creating a new chapter V in 8 CFR for functions retained by the Department of Justice, beginning with 8 CFR part 1001. 68 FR 9824 (Feb. 28, 2003); 68 FR 10349 (March 5, 2003). Chapter V now contains the regulations governing EOIR, while the immigration regulations of DHS are contained in chapter I in 8 CFR. The rules and procedures concerning professional conduct for representation and appearances before the immigration judges and the Board are now codified in 8 CFR part 1003, subpart G. The rules for representation and appearances before the immigration judges and the Board are codified in 8 CFR part 1292. The rules for representation and appearances and for professional conduct before DHS and its components remain codified in 8 CFR parts 103 and 292.

Both sets of rules provide a unified process for disciplinary hearings whether the hearing is instituted by EOIR or by DHS. *See generally Matter of Shah,* 24 I&N Dec. 282 (BIA 2007) (imposing discipline on attorney who knowingly and willfully misled USCIS by presenting an improperly obtained certified Labor Condition Application in support of a nonimmigrant worker petition). For instance, 8 CFR 292.3(b) provides for the imposition of disciplinary sanctions against practitioners who appear before DHS for violating the grounds of discipline stated in 8 CFR 3.102 (now codified as § 1003.102). *See also* 8 CFR 1292.3(b) (parallel EOIR regulations). Further, DHS disciplinary hearings are to be heard and decided according to 8 CFR 3.106(a), (b), and (c) (now codified as § 1003.106), which govern EOIR disciplinary hearings. *See* 8 CFR 292.3(f) (DHS regulations) and 1292.3(b), (f) (parallel EOIR regulations). Finally, both sets of rules provide for cross-discipline, which allows EOIR to request that any discipline imposed against a practitioner for misconduct before DHS also be imposed with respect to that practitioner's ability to represent clients before the immigration judges and the Board, and vice versa. *See* 8 CFR 292.3(e)(2) (DHS) and 1003.105(b) (EOIR).

This proposed rule amends only the EOIR regulations governing representation and appearances, and professional conduct under chapter V in 8 CFR. This rule does not make any changes to the DHS regulations governing representation and appearances or professional conduct.

Currently, the disciplinary regulations allow EOIR to sanction practitioners, including attorneys and certain non-attorneys who are permitted to represent individuals in immigration proceedings (''representatives''), when discipline is in the public interest; namely, when a practitioner has engaged in criminal, unethical, unprofessional conduct or frivolous behavior. Sanctions may include expulsion or suspension from practice before EOIR and DHS, and public or private censure. EOIR frequently suspends or expels practitioners who are subject to a final or interim order of disbarment or suspension by their state bar regulatory authorities—this is known as ''reciprocal'' discipline.[1] As of January 2008, EOIR has disciplined 380 practitioners since the rules took effect in 2000.

The Attorney General completed a comprehensive review of EOIR's responsibilities and programs, and determined that the immigration judges should have the tools necessary to control their courtrooms and protect the adjudicatory system from fraud and abuse. Accordingly, the Attorney General determined that the existing regulations, including those at 8 CFR 1003.101–109, should be amended to provide for additional sanction authority for false statements, frivolous behavior, and other gross misconduct. Additionally, the Attorney General found that the Board should have the ability to effectively sanction litigants and practitioners for defined categories of gross misconduct.

As a result, this proposed rule seeks to preserve the fairness and integrity of immigration proceedings, and increase the level of protection afforded to aliens in those proceedings by defining additional categories of behavior that constitute gross misconduct.

In part, the proposed rule responds to the Attorney General's prescribed measures by adding substantive grounds of misconduct pursuant to the American Bar Association Model Rules of Professional Conduct (2006) (ABA Model Rules) that will subject practitioners to sanctions if they violate such standards and fail to provide adequate professional representation for their clients. Specifically, the grounds for sanctionable misconduct have been revised to include language that is similar, and sometimes identical, to the language found in the ABA Model Rules, as such disciplinary standards are widely known and accepted within the legal profession. Although EOIR does not seek to supplant the disciplinary functions of the various state bars, this proposed rule aims to strengthen the existing rules in light of the apparent gaps in the current regulation. *See Matter of Rivera-Claros,* 21 I&N Dec. 599, 604 (BIA 1996). In addition, these revisions will make the EOIR professional conduct requirements

[1] ''Reciprocal discipline'' is not to be confused with the ''cross-discipline'' between EOIR and DHS codified as ''reciprocity of disciplinary sanctions'' in 8 CFR 292.3(e)(2) and 1003.105(b).

more consistent with the ethical standards applicable in most states.

This proposed rule would also enhance the existing regulation by amending the current procedures and definitions through technical modifications that are more consistent with EOIR's authority to regulate practitioner misconduct. *See Koden* v. *U.S. Dep't of Justice,* 564 F.2d 228, 233 (7th Cir. 1977); 8 U.S.C. 1103, 1362. For example, the proposed rule would amend the definition of ''attorney'' at 8 CFR 1001.1(f) by adding language stating that an attorney is one who is eligible to practice law in a U.S. state or territory. Additionally, this proposed rule would amend the language at 8 CFR 1292.1(a)(2) to clarify that law students and law graduates must be students and graduates of accredited law schools in the United States. Accordingly, the proposed rule will allow EOIR to investigate and prosecute instances of misconduct more effectively and efficiently while ensuring the due process rights of both the client and the practitioner.

This Proposed Rule

A. Section 1001.1(f)—Definition of Attorney

Section 1001.1 paragraph (f) defines ''attorney'' as that term is used in section 8 CFR 1292.1, *Representation of others,* which regulates who may represent individuals in proceedings before the immigration judges and the Board. The proposed rule would revise the definition of ''attorney'' to clarify that any attorney who practices before EOIR must be eligible to practice law in at least one State, possession, territory, or Commonwealth of the United States, or the District of Columbia.

Presently, EOIR must recognize an attorney who is in good standing with a state licensing authority so long as the attorney has not been suspended or disbarred. However, in some states, an attorney may be able to obtain a certificate of good standing from the licensing authority, but still be administratively ineligible to practice law in that state. This proposed change will ensure that an attorney may practice before EOIR only if he or she is both in good standing and maintains a status with the state licensing authority that permits practice in the courts of that state. In many jurisdictions, the only status that will permit practice before the state courts will be ''active'' status. However, in some jurisdictions, inactive or retired attorneys have a limited right to practice before state courts if the inactive or retired attorneys' representation is without compensation (i.e., pro bono). So long as inactive or retired attorneys have such a right to limited practice and they comply with all of the requirements imposed by their state licensing authority in all of their cases before EOIR, then EOIR would consider those attorneys to be eligible to practice law for the purpose of section 1001.1(f).

B. Part 1003, Subpart G—Professional Conduct for Practitioners—Rules and Procedures

1. Section 1003.102—Grounds of Misconduct

Section 1003.102 of the regulations sets forth the grounds of discipline against practitioners. This rule proposes to revise paragraphs (e), (k), and (l) and to add several additional grounds of discipline as described below.

a. Section 1003.102(e)—Reciprocal Discipline

Presently, EOIR may impose discipline on a practitioner if the practitioner resigns, with an admission of misconduct, from practice in a state jurisdiction, a federal court, or an executive branch department, board, commission, or other government entity. The result of this rule is that EOIR cannot discipline a practitioner who resigned from practice in another jurisdiction, court, or agency while a disciplinary investigation or proceeding was pending if the practitioner did not admit misconduct during that investigation or proceeding. This provides practitioners with an incentive to resign from another jurisdiction, court, or agency without admitting misconduct in order to continue to practice before EOIR. Therefore, we propose to amend our rule to be consistent with the recommended practice of the American Bar Association, as stated in Rule III(A) of the Model Federal Rules of Disciplinary Enforcement, by permitting the imposition of discipline on an attorney who resigns while a disciplinary investigation or proceeding is pending.

b. Section 1003.102(k)—Previous Finding of Ineffective Assistance of Counsel

One ground for sanctions is the ineffective assistance of counsel as previously determined by the Board or an immigration judge. This proposed rule would extend this ground to include findings made by federal court judges. Many aliens appeal decisions by the Board to the federal circuit courts, which now receive approximately 750 petitions for review per month challenging decisions of the Board. In such cases, the federal court sometimes makes a finding that an attorney provided ineffective assistance of counsel in an immigration proceeding. Whether such a finding is made by an immigration judge, the Board, or a federal court, the harm to the alien remains the same, and this revision will allow the EOIR disciplinary process to take account of findings of ineffective assistance of counsel in EOIR proceedings made by a federal court.

c. Section 1003.102(l)—Failure To Appear in a Timely Manner

Currently § 1003.103(l) provides for disciplinary sanctions for practitioners who repeatedly fail to appear for scheduled hearings in a timely manner without good cause. This proposed rule would make the language of this ground more general, to cover failure to appear for ''pre-hearing conferences, scheduled hearings, or case-related meetings'' in a timely manner.

d. Section 1003.102(n)—Conduct Prejudicial to the Administration of Justice

This rule proposes to add a new ground for disciplinary sanctions at § 1003.102(n) with respect to conduct that is ''prejudicial to the administration of justice or undermines the integrity of the adjudicative process.''

The prohibition on conduct prejudicial to the administration of justice is found in the ABA Model Rules and such conduct is widely recognized within the legal profession as a sanctionable offense. *See* ABA Model Rule 8.4(d) (stating that ''[i]t is professional misconduct for a lawyer to * * * engage in conduct that is prejudicial to the administration of justice''). In this regard, EOIR's mandate to fairly and efficiently adjudicate cases under the immigration laws of the country remains the single most important function of the agency. As a result, safeguarding the adjudicative process from abuse is necessary in order to achieve this function, and accordingly, misconduct that jeopardizes or otherwise impairs the administration of justice will be subject to sanctions.

In discerning the most appropriate parameters for this ground, *In re Hopkins,* 677 A.2d 55, 60–61 (D.C. 1996), is instructive. In that case, the D.C. Court of Appeals held that an attorney's conduct must satisfy the following criteria for such conduct to be viewed as prejudicial to the administration of justice. First, the conduct, which includes any action or inaction, depending on the circumstances, must be considered improper. Improper conduct occurs, for instance, when the practitioner ''violates a specific statute, court rule or procedure, or other disciplinary rule,'' but impropriety may also be found when, considering all the circumstances, the practitioner ''should know that he or she would reasonably be expected to act in such a way as to avert any serious interference with the administration of justice.'' *Id.* at 61.

Second, in order to fall under the domain of the ''administration of justice,'' the conduct ''must bear directly upon the judicial process * * * with respect to an identifiable case or tribunal.'' *Id.* Third, the practitioner's conduct ''must taint the judicial process in more than a *de minimis* way; that is, at least potentially impact upon the process to a serious and adverse degree.'' *Id.* As a result, conduct that will generally be subject to sanctions under this ground includes any action or inaction that seriously impairs or interferes with the adjudicative process when the practitioner should have reasonably known to avoid such conduct.

e. Section 1003.102(o)—Competence

This rule proposes to add a new ground for disciplinary sanction at section 1003.102(o). As noted above, the revised grounds for disciplinary sanctions include language that is similar, if not identical to, the ABA Model Rules. In this case, the proposed rule incorporates language from ABA Model Rule 1.1, which deals with providing competent representation, and language from the comments on Model Rule 1.1 relating to ''Thoroughness and Preparation.'' *See* ABA Model Rule 1.1. While most practitioners competently represent their clients in immigration proceedings, a small percentage of the practitioners do not meet the minimum standards set forth in this rule, which includes the requisite ''legal knowledge, skill, thoroughness, and preparation reasonably necessary'' for representation, and the use of ''methods and procedures meeting the standards of competent practitioners.'' As this principle has been one of the hallmarks of the ABA Model Rules, we find that the existing rule should incorporate a provision devoted to competence in order to ensure that all practitioners meet minimal performance standards in rendering services. We note that many clients, given their unfamiliarity with immigration law and their potentially limited ability to communicate and express themselves effectively, are likely to rely heavily on a practitioner's assistance in immigration matters. In addition, the comments in the ABA Model Rules state that the requisite level of attention and preparation are determined, in part, by what is at stake. The stakes are quite high in immigration proceedings, which determine whether aliens are allowed to remain in the United States. As such, competence is perhaps the most fundamental and necessary element in providing representation to clients in immigration proceedings.

f. Section 1003.102(p)—Scope of Representation

This rule proposes to add a new ground for disciplinary sanction at § 1003.102(p). Here, the proposed rule incorporates language from ABA Model Rule 1.2, which primarily deals with the scope of representation, and language from the comments on Model Rule 1.2 relating to ''Allocation of Authority between Client and Lawyer.'' *See* ABA Model Rule 1.2. This rule would require a practitioner to ''abide by a client's decisions concerning the objectives of representation'' and to ''consult with the client as to the means by which they are to be pursued.''

Thus, as a general matter, this obligation requires the practitioner to act in accordance with the scope of representation in attempting to meet the client's goals, as determined by the terms of the client-practitioner relationship. The scope of representation, of course, is a fact-specific matter that turns on the specific agreements in each case. By increasing the emphasis on clarity in the scope of representation agreement, this ground will also protect practitioners from spurious complaints of ineffective assistance of counsel by ensuring that parties to a representation agreement fully understand the scope of representation.

To illustrate, clients who submit complaints of ineffective assistance of counsel often allege that they retained representation for the duration of immigration proceedings—meaning that the practitioner who agreed to represent the client consented to carry out the terms of the client-practitioner agreement before the immigration judge and, if necessary, the Board—but that the practitioner in their case failed to submit an appeal brief to the Board after indicating in the Notice of Appeal that a brief would be filed. In most cases, this failure will result in a dismissal of the alien's case and a deportation or removal order will be issued as the final agency decision. If the practitioner had agreed to represent the client not only before the immigration judge but also with respect to an appeal to the Board, the practitioner's negligence or misconduct in failing to file a brief resulted in the client's objectives being thwarted in such instances. Practitioners who fail to abide by the scope of representation will be subject to discipline under this ground.

This rule also requires that the practitioner and client reach a ''mutually acceptable resolution'' should any disagreements arise, and that if such efforts are unavailing in the face of a fundamental disagreement, the practitioner is allowed to request a withdrawal from the case under the applicable standards. *See* 8 CFR 1003.17(b) (allowing for a withdrawal or substitution of an attorney or representative when an immigration judge permits such a request based on an oral or written motion) and 1003.38(g) (allowing for a withdrawal or substitution of an attorney or representative when the Board permits such a request based on a written motion); *see also Matter of Rosales,* 19 I&N Dec. 655, 657 (BIA 1988) (stating that a motion to withdraw ''should include evidence that [the practitioner] attempted to advise the respondent, at his last known address, of the date, time, and place of the scheduled hearing,'' and ''provide the immigration judge with the respondent's last known address. * * *'').

One of the primary goals of this proposed rule is to preserve the fairness and integrity of the adjudicative process in immigration proceedings. However, this goal cannot be achieved when a practitioner fails to adhere to his or her clients' objectives by effectively withdrawing from their case without providing them ample notice so that they can retain another practitioner to represent them. Indeed, improper withdrawals in immigration proceedings have been discussed by various federal circuit courts of appeals, which have generally held that such withdrawals violate a client's right to receive a fundamentally fair hearing. *See, e.g., Gjeci* v. *Gonzales,* 451 F.3d 416, 422 (7th Cir. 2006) (stating that ''a lawyer's professional responsibility upon withdrawal includes the duty to take reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving notice to the client, allowing time for the employment of other counsel, and delivering to the client all [necessary] papers and property. * * *'') (citing ABA Model Rule 1.16(d) (2004)). Furthermore, immigration judges have stated that they are frequently forced to reschedule cases due to a practitioner's failure to inform the client of his or her possible nonappearance at a scheduled hearing or to properly request a withdrawal from the case. Given the considerable caseloads that immigration judges are required to manage, a practitioner's failure to appear or improper withdrawal in a case not only may result in significant harm to the client. Such conduct may also impede the immigration judges', and consequently the agency's, ability to efficiently adjudicate cases, causing unnecessary delays for other parties seeking to have their cases timely heard and adjudicated.

g. Section 1003.102(q)—Diligence

This rule proposes to add a new ground for disciplinary sanction at section 1003.102(q). In this instance, the proposed rule incorporates language from ABA Model Rule 1.3, which pertains to acting with ''reasonable diligence and promptness in representing a client,'' and language from the comments to Model Rule 1.3 relating to: (1) Controlling and managing one's workload so that each matter can be handled competently; (2) acting with reasonable promptness particularly with respect to time and filing restrictions; and (3) continuing the representation to the conclusion of all matters undertaken for the client, unless the relationship is terminated pursuant to 8 CFR 1003.17(b) for proceedings before the immigration courts or 8 CFR 1003.38(g) for proceedings before the Board. *See* ABA Model Rule 1.3.

Given that most practitioners appearing in immigration matters exemplify high standards of professional conduct, this provision will primarily affect those whose conduct raises questions about their fitness to represent aliens in such matters. Nonetheless, the gravity of the consequences of failing to act diligently cannot be overstated in this context, as immigration proceedings are meant to determine who is allowed to lawfully remain in this country. Diligence is a particularly important aspect of representing clients in immigration proceedings because those proceedings are subject to numerous filing requirements and other time-sensitive conditions. Unfortunately, in too many cases, an alien's interests may be compromised due to a practitioner's failure to observe time-related and filing considerations. Indeed, complaints of ineffective assistance of counsel often include allegations regarding a practitioner's failure to timely submit notices, applications, briefs, or other relevant matters pursuant to recognized rules and practices governing filing requirements. *See, e.g.,* 8 CFR 1003.38(b) (requiring that the Notice of Appeal be filed with the Board within 30 days after an immigration judge issues his or her decision); 8 CFR 1003.2(b)(2) (requiring that a motion to reconsider be filed within 30 days after the mailing of the Board's decision); 8 CFR 1003.2(c)(2) (requiring that a motion to reopen be filed within 90 days after the date of the final administrative decision). In such instances, a client's interests might be seriously compromised if a practitioner fails to meet these deadlines.

The duty to act diligently will often function in tandem with the scope of representation, as discussed above. To the extent of the agreed-upon scope of representation, the practitioner is required to handle all matters both competently and in a timely manner, and disputes with the client do not obviate his or her duties in this regard unless the relationship is formally terminated, as described above.

Thus, given that the duty to diligently represent a client exemplifies a practitioner's most basic duty to execute the terms of the representation within a reasonable time, combined with the fact that the appeals process and most applications for relief operate under time-sensitive constraints, this proposed addition to the sanctionable grounds of misconduct represents a significant measure to safeguard the public against negligent and defective representation.

h. Section 1003.102(r)—Communication

This rule proposes to add a new ground for disciplinary sanction at section 1003.102(r). Here, the proposed rule incorporates language from ABA Model Rule 1.4, which deals with the duty to maintain communication with the client, and language from the comments on Model Rule 1.4 relating to ''Communicating with Client.'' *See* ABA Model Rule 1.4. Specifically, this duty includes (1) promptly informing and consulting with the client in any matter when his or her informed consent is reasonably required; (2) reasonably consulting with the client about the means by which the client's objectives are to be accomplished; (3) keeping the client reasonably informed about the status of the matter; and (4) promptly complying with reasonable requests for information. *Id.* This proposed rule also mandates that when a practitioner's prompt response is not feasible, he or she, or a member of his or her staff, ''should acknowledge receipt of the request and advise the client when a response may be expected.''

A practitioner's duty to maintain communication with a client is of fundamental importance. For instance, some practitioners fail to inform clients of scheduled hearings. In addition, negligence in discussing relevant facts and issues often prevents a client's objectives from being met. Ineffective assistance of counsel claims routinely involve the failure of the practitioner to meet with the client sufficiently in advance of a scheduled hearing to review material and substantive issues. And some practitioners subject clients to inadequate impromptu meetings that occur immediately before the time in which testimony by the client is to be presented to the immigration judge. Often, such poor and insufficient communication with a client not only jeopardizes the client's case but also undermines the integrity of the administrative process, which requires an examination of all relevant information while giving sufficient opportunities to the respective parties to present necessary and relevant evidence. Communications with a client should be scheduled sufficiently in advance to provide proper notice of the date and time of scheduled hearings, allow proper preparation for the hearing, and permit submission of motions, applications, evidence, and other matters in compliance with applicable deadlines, including advance filing deadlines set by the immigration judge. Finally, given the nature of immigration proceedings, the regulation makes clear that it is the obligation of the practitioner to ensure that all necessary communications are in a language that the client understands.

i. Section 1003.102(s)—Candor Toward the Tribunal

This rule proposes to add a new ground for disciplinary sanction at section 1003.102(s). In this instance, the proposed rule incorporates language from ABA Model Rule 3.3, which deals with, *inter alia,* the duty to ''disclose to the tribunal legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel.'' *See* ABA Model Rule 3.3. This rule is meant to deter a practitioner from neglecting to cite specific legal authority to the adjudicator that is known to be adverse to a client's position. Adequate representation requires an individualized assessment of a given client's factual history and the legal issues involved in his or her claim, while specifically addressing case law or other legal standards that are contrary to such a claim. Representation that fails to disclose such integral information undermines the purpose and credibility of the administrative process, and undermines the level of trust and confidence that a client has toward a practitioner.

j. Section 1003.102(t)—Notice of Entry of Appearance

This rule proposes to add a new ground for disciplinary sanction at section 1003.102(t). This ground of the proposed rule is patterned after language in Rule 11 of the Federal Rules of Civil Procedure (FRCP), which requires that all pleadings, motions, or other papers submitted to a court be signed by at least one attorney of record, or when the client is unrepresented, by the party. In each case where the alien is represented, this proposed rule requires that ''every pleading, application, motion, or other filing * * * be signed by the practitioner of record in his or her individual name.''

In this regard, the proposed rule subjects a practitioner to sanctions should he or she fail to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative when the practitioner has ''prepared, completed, or otherwise participated in the completion or submission of any pleading, application, motion, or other filing, and * * * [h]as been deemed to engage in a pattern or practice of failing to submit such Forms as required.'' This includes the submission of Form EOIR–28, as required by § 1003.17(a) for cases pending before an immigration judge and Form EOIR–27, as required by § 1003.3(a)(3), for appeals filed with the Board.

This provision is intended to address the growing problem of practitioners who seek to avoid the responsibilities of formal representation by routinely failing to submit the required notice of entry of appearance forms. Furthermore, the difficulties in pursuing a practitioner for discipline for participating in the preparation of false or misleading documents are apparent when the practitioner fails to submit a completed notice of entry of appearance form.

The United States Court of Appeals for the Ninth Circuit has recognized that the notice of appearance requirement at 8 CFR 1003.38(g) serves important purposes. *See Singh* v. *INS,* 315 F.3d 1186, 1189 (9th Cir. 2003) (noting that the Board ''has a substantial interest in assuring that, at any given time, there is no ambiguity as to who has been given, and who has accepted, the responsibility of representing a party before it.''). Pursuant to the regulations, ''the notice of appearance constitutes an affirmative representation by the purported representative to the [Board] that he or she is qualified to be a representative under the applicable regulations, that he or she has been authorized by the party on whose behalf he or she appears, and that he or she accepts the responsibility of representation until relieved.'' *Id.* The court also held that a client's due process right to be represented by counsel of his or her choice is not impaired by ''reasonable rules of process'' that can be satisfied with minimal effort. *See id.* at 1190–91.

Given that these amendments are meant to advance the level of professional conduct in immigration matters and foster increased transparency in the client-practitioner relationship, the Department does not believe that a practitioner who agrees to undertake a client's case—thereby causing the client to reasonably rely on his or her claims as to the competency of such representation—should be able to avoid the legal obligations that flow from such a relationship. Thus, any practitioner who accepts responsibility for rendering immigration-related services to a client should be held accountable for his or her actions, including the loss of the privilege of practicing before the immigration judges and the Board, when such conduct fails to meet the minimal standards of professional conduct described in section 1003.102. In this regard, these provisions are similar to the policies of the Internal Revenue Service and other federal agencies that require signatures of professionals retained to assist in the filing of various forms and applications. In this context, the goals of incorporating such measures include accountability for the preparer and presenter of documents that are submitted to the government and the elimination of fraudulent practices that undermine a client's ability to seek recourse against a practitioner when the practitioner fails to formally acknowledge representation and subsequently provides ineffective assistance of counsel or otherwise engages in misconduct.

k. Section 1003.102(u)—Repeated Filings Indicating a Substantial Failure to Competently and Diligently Represent the Client

This rule proposes to add a new ground for disciplinary sanction at section 1003.102(u) with respect to filings made to an adjudicator. In such circumstances, the proposed rule will subject a practitioner to sanctions if he or she ''repeatedly files notices, motions, briefs, or claims that reflect little or no attention to the specifics of a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client.'' This addition to the grounds of sanctionable misconduct is being proposed because of the frequency with which this kind of behavior occurs and to ensure that practitioners are fully aware that such conduct is considered inappropriate and unacceptable.

The Board has experienced situations in which the same practitioner repeatedly, on behalf of different clients, files boilerplate briefs and motions, with no recitation of the specific facts and little or no application of law to the facts of a case. Moreover, the Board has experienced situations in which the same practitioner repeatedly submits appellate briefs that are nearly identical, with little or no regard for the specific facts in his or her client's case. EOIR has also observed that in these situations, the practitioners often fail to brief the issues that are critical to their client's case.

Practitioners who engage in this behavior may be subject to sanctions when the behavior indicates a substantial failure to competently and diligently represent the client. *See, e.g.,* ABA Model Rules 1.1, 1.3, and proposed § 1003.102(o). While such behavior may be subject to sanctions under other grounds, the Department believes that a separate category for practitioners who repeatedly engage in this behavior will tend to deter practitioners from taking advantage of clients who lack the knowledge or language skills to protect themselves. This additional category will also enhance the government's ability to preserve the integrity of immigration matters as well as prevent abuse of the administrative process.

2. Section 1003.103—Immediate Suspension and Summary Disciplinary Proceedings; Duty of Practitioner To Notify EOIR of Conviction or Discipline

a. Section 1003.103(a)—Immediate Suspension

Section 1003.103(a) allows for immediate suspension of a practitioner who has been convicted of a serious crime, or an attorney who has been disbarred or suspended or has resigned with an admission of misconduct. This rule proposes to revise section 1003.103(a)(1) to clarify that immediate suspension under this section may be imposed against an attorney placed on an interim suspension in state licensing authority or federal court discipline proceedings pending a final resolution of the underlying disciplinary matter. Certain misconduct poses such an immediate threat to the public that a state licensing authority or federal court will immediately suspend an attorney pending final determination of the ultimate discipline to be imposed. An attorney who is thus restricted by a state licensing authority or federal court in the practice of law is not authorized to represent individuals pursuant to 8 CFR 1292 (representation and appearances). Accordingly, this proposed rule clarifies the existing regulation to ensure conformity with the rules on representation and appearances, and also to ensure that individuals in immigration proceedings are sufficiently protected from practitioners who engage in the most egregious misconduct. Further, we propose to remove the requirement that an attorney resign with an admission of misconduct and instead add a new standard, which permits an immediate suspension when an attorney resigns while a disciplinary investigation or proceeding is pending. This change is consistent with our proposal to modify section 1003.102(e) as explained earlier.

b. Section 1003.103(a)(2)—Public Postings of Immediate Suspensions

This rule proposes to revise section 1003.103(a)(2) to clarify that notices of immediate suspensions may be posted publicly. This change is proposed to ensure consistency with 8 CFR 1003.106(c), which currently provides that notice of disciplinary sanctions may be posted publicly, and corrects an oversight in the prior publication of the rule.

c. Section 1003.103(b)—Initiation of Disciplinary Proceedings

Section 1003.103(b) provides that summary disciplinary proceedings shall be initiated ''promptly'' against a practitioner who has been convicted of a serious crime, or an attorney who is subject to a final order of suspension or disbarment or who has resigned with an admission of misconduct. In reciprocal discipline cases (when an attorney has already been suspended or disbarred), summary disciplinary proceedings can only be initiated by EOIR once a final order has been issued in the state licensing authority or federal court disciplinary proceeding. 8 CFR 1003.102(e)(1). Such state licensing authority or federal court disciplinary proceedings can sometimes take months, if not years, to complete. Because EOIR summary disciplinary proceedings found at 8 CFR 1003.103(b) require the submission of a certified copy of the final order from the licensing state or federal court, EOIR cannot commence those proceedings until the underlying disciplinary process has been completed. Therefore, this rule proposes to revise § 1003.103(b) to clarify that EOIR summary disciplinary proceedings will be promptly commenced upon receipt of a certified copy of the final decision of the state licensing authority or federal court. Consistent with the proposed changes to §§ 1003.102(e) and 1003.103(a)(1), we propose to modify this provision by changing the basis for summary disciplinary proceedings from a resignation with an admission of misconduct to a resignation while a disciplinary investigation or proceeding is pending.

d. Section 1003.103(b)(2)—Burden of Proof

Section 1003.103(b)(2)—in addition to §§ 1003.106(a)(1)(iv), 1003.106(b), and 1003.107(b)(1)—currently employs a burden of proof that requires the practitioner, counsel for the government, or adjudicating official to demonstrate certain aspects of the disciplinary proceeding by ''clear, unequivocal, and convincing evidence.'' This proposed rule would amend the burden of proof in these instances by removing the term ''unequivocal'' in order to conform with the standard of ''clear and convincing evidence'' that is currently used by immigration judges and the Board in, *inter alia,* determining deportability. *See* section 240(c)(3) of the Act, 8 U.S.C. 1229a(c)(3). This change in the burden of proof was originally mandated by section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which removed the term ''unequivocal'' from section 240(c)(3) of the Act. *See id.* (stating that the government ''has the burden of establishing by clear and convincing evidence that * * * the alien is deportable''). Further, the current rule at § 1003.106(a)(1)(v) states that ''[d]isciplinary proceedings shall be conducted in the same manner as Immigration Court proceedings as is appropriate. * * *'' *See* 8 CFR 1003.106(a)(1)(v). Thus, in order to provide a disciplinary process that corresponds to existing procedures and burdens of proof, as well as authorize adjudicating officials to utilize prevailing standards and terminology in the course of their decisionmaking, this rule proposes to eliminate the ''unequivocal'' language in the aforementioned sections. While such a change likely will not result in much, if any, measurable effect, it is appropriate to maintain consistency with existing procedures in proceedings before the immigration judges to allow all parties to operate under a familiar and widely accepted framework.

3. Section 1003.104(d)—Referral of Complaints

Section 1003.104(d) provides that EOIR shall make a referral to the Inspector General and, if appropriate, to the FBI of credible information or allegations of criminal conduct involving a practitioner. In the light of experience, and the transfer of the authority of the former INS to DHS, this rule proposes to revise section 1003.104(d) also to provide for referral of such information or allegations to DHS, the U.S. Attorney, or other law enforcement agency.

4. Section 1003.105—Notice of Intent To Discipline

Section 1003.105 provides that EOIR will serve a Notice of Intent to Discipline, containing a statement of the charge(s) and a preliminary inquiry report, if sufficient evidence exists to warrant charging a practitioner with professional misconduct. We propose to modify this section regarding service of the Notice of Intent to Discipline and to limit the circumstances under which we will serve a preliminary inquiry report with a Notice of Intent to Discipline. We also plan to divide this section into two subparagraphs. Finally, we plan to specify that we will serve a copy of the Notice of Intent to Discipline on the practitioner who was the subject of the preliminary inquiry, and that the Office of the General Counsel for EOIR will file the Notice of Intent to Discipline with the Board.

Section 1003.105 currently states that the Office of the General Counsel for EOIR will serve a Notice of Intent to Discipline in the manner specified in 8 CFR 103.5a. Although § 103.5a was originally promulgated when former INS was part of the Department of Justice, section 103.5a is now a DHS regulation. Accordingly, we are removing the cross-reference to a DHS regulation and replacing it with a full text explanation of how we will serve a Notice of Intent to Discipline. For this same reason and as indicated below, we are proposing to delete two cross-references to § 103.5a that appear in § 1003.106, and instead cross-reference existing EOIR regulations concerning service.

We propose to state that service of a Notice of Intent to Discipline will be made either by certified mail to the practitioner's last known address or personal delivery. As proposed, a practitioner's last known address will be the address that EOIR has on record for the practitioner if the practitioner is representing a party before EOIR on the date the Notice of Intent to Disqualify is served. If the practitioner does not have an active case before EOIR, the last known address of the practitioner would depend on the practitioner's status. If the practitioner is an attorney, then the last known address would be the address that the attorney's state licensing authority has on record for the attorney. The last known address for an accredited representative would be that of the recognized organization with which the accredited representative is affiliated. Finally, the last known address for an accredited official would be the embassy of the foreign government that employs the accredited official.

We also propose to limit the circumstances under which we will prepare and serve a copy of a preliminary inquiry report with the Notice of Intent to Disqualify. A preliminary inquiry report summarizes the source of any information uncovered in the investigation of a disciplinary complaint, including the administrative record of immigration proceedings, a record of state licensing authority or federal court disciplinary proceedings, or a record of criminal conviction. In summary disciplinary cases brought either as a result of state licensing authority or federal court disciplinary proceedings, or criminal convictions, the preliminary inquiry document provides no additional information that is not also contained in the Notice of Intent to Discipline. Therefore, this rule proposes to revise § 1003.105(a) to state that in summary disciplinary proceedings EOIR is not required to file a preliminary inquiry report along with the Notice of Intent to Discipline.

5. Section 1003.106—Hearing and Disposition

a. Request for Hearing

Section 1003.106 sets forth hearing procedures for disciplinary proceedings. In summary discipline cases brought either as a result of state licensing authority or federal court disciplinary proceedings or criminal convictions, the underlying basis to impose sanctions against a practitioner already has been established via a disciplinary or criminal proceeding. In such cases, there may be no need to re-litigate or replicate the factual findings given that such authorized tribunals or agencies have already made a finding of misconduct, or a violation of criminal law which is often tantamount to a finding of misconduct. Thus, in order to promote efficiency and avoid conducting unnecessary evidentiary hearings, this rule proposes to amend the language in 8 CFR 1003.105(c)(3) and 8 CFR 1003.106 to provide that a hearing will be held in disciplinary cases when a practitioner can demonstrate that such a hearing is warranted.

Specifically, when a practitioner who is subject to summary disciplinary proceedings pursuant to § 1003.103(b) requests a hearing, he or she must make a prima facie showing either that ''[h]e or she can rebut the presumption of professional misconduct by establishing one or more of the exceptions set forth in [sections] 1003.103(b)(2)(i)–(iii)'' or that ''[m]itigating factors exist and should be considered with regard to the level of discipline to be imposed.'' The proposed rule also retains the provision that the opportunity for a hearing will be deemed waived when such a request is not made.

b. Fifteen Day Waiting Period

Sections 1003.105(d)(2) and 1003.106(c) contain provisions stating that any final order imposing discipline shall take effect no sooner than fifteen days from the date of the order to provide disciplined practitioners an opportunity to withdraw from pending matters and notify clients. However, in cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103, the practitioner has already ceased practice and has had the opportunity to withdraw from pending immigration matters. Therefore, by the time the Board issues a final order imposing a suspension or expulsion, the practitioner does not need the fifteen-day waiting period, as described above, prior to the effective date of the final order of discipline. Accordingly, this rule proposes to delete the fifteen-day waiting period at 8 CFR 1003.105(d)(2) and 1003.106(c) for cases in which the Board has already imposed an immediate suspension prior to the issuance of a final order of discipline.

c. Service of Hearing Notices and Board Decisions

As discussed above in conjunction with the proposed changes to § 1003.105, we have decided to delete two cross-references to a DHS regulation, 8 CFR 103.5a, in § 1003.106. We propose to modify § 1003.106 to cross-reference EOIR's existing regulations concerning service.

6. Section 1003.107—Renewing an Entry of Appearance

Section 1003.107 permits a practitioner's reinstatement following an expulsion or suspension provided that the practitioner complies with the procedures set forth in the regulation. This rule proposes to add a paragraph clarifying the practitioner's obligation to renew his or her notice of entry of appearance by filing the appropriate forms in every case in which he or she resumes representation before the Board and the Immigration Courts.

C. Part 1292—Representation and Appearances

In § 1292.1, paragraph (a)(2) provides that law students and law graduates may represent individuals in proceedings before the immigration judges and the Board. This provision has created some confusion about graduates of foreign law schools who claim to be eligible to practice before EOIR. The rule on appearances by law students and law graduates was promulgated with the intent that such individuals would provide representation only under proper supervision and within the context of pro bono representation sponsored by an accredited law school or a non-profit organization. *See* 55 FR 49250 (Nov. 27, 1990). This rule was not intended to permit graduates of foreign law schools to practice law before EOIR without becoming duly licensed in the United States. This proposed rule would amend the language at 8 CFR 1292.1(a)(2) to clarify that law students and law graduates must be students and graduates of accredited U.S. law schools.

This proposed rule also removes paragraph (a)(6) of § 1292.1, which refers to foreign attorneys in matters being adjudicated outside the United States. While the corresponding provision in the DHS regulations, 8 CFR 292.1(a)(6), is relevant for foreign attorneys who are involved in DHS adjudications conducted abroad, this provision is not necessary for EOIR regulations since all EOIR adjudications are conducted in the United States.

Regulatory Requirements

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only those practitioners who practice immigration law before EOIR. This rule will not affect small entities, as that term is defined in 5 U.S.C. 601(6), because the rule is similar in substance to the existing regulatory process.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866—Regulatory Planning and Review

The Attorney General has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and, accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this proposed rule because there are no new or revised record keeping or reporting requirements.

List of Subjects

8 CFR Part 1001

Administrative practice and procedures, Immigration, Legal Services.

8 CFR Part 1003

Administrative practice and procedures, Immigration, Legal Services, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

8 CFR Part 1292

Administrative practice and procedures, Immigration, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, parts 1001, 1003, and 1292 of title 8 of the Code of Federal Regulations are proposed to be amended as follows:

PART 1001—DEFINITIONS

1. The authority citation for part 1001 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103.

2. Amend § 1001.1 by revising paragraph (f) to read as follows:

§ 1001.1 Definitions.

* * * * *

(f) The term *attorney* means any person who is eligible to practice law in and is a member in good standing of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law.

* * * * *

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

3. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1103; 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub L. 105–100.

§ 1003.1 [Amended]

4–5. Amend § 1003.1 by removing from paragraph (d)(5) the citation ''§ 1.1(j) of this chapter'' and adding in its place the citation ''§ 1001.1(j) of this chapter''.

Subpart G—Professional Conduct for Practitioners—Rules and Procedures

6. Amend § 1003.102 by:

a. Removing from paragraph (j)(2) the citation ''§ 1003.1(d)(1–a)'' and adding in its place the citation ''§ 1003.1(d)'';

b. Revising paragraphs (e) introductory text, (k), (l), and (m); and by

c. Adding paragraphs (n) through (u), to read as follows:

§ 1003.102 Grounds.

* * * * *

(e) Is subject to a final order of disbarment or suspension, or has resigned while a disciplinary investigation or proceeding is pending;

* * * * *

(k) Engages in conduct that constitutes ineffective assistance of counsel, as previously determined in a finding by the Board, an immigration judge in an immigration proceeding, or a Federal court judge or panel, and a disciplinary complaint is filed within one year of the finding;

(l) Repeatedly fails to appear for pre-hearing conferences, scheduled hearings, or case-related meetings in a timely manner without good cause;

(m) Assists any person, other than a practitioner as defined in § 1003.101(b), in the performance of activity that constitutes the unauthorized practice of law;

(n) Engages in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process;

(o) Fails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners;

(p) Fails to abide by a client's decisions concerning the objectives of representation and, in accordance with paragraph (r) of this section, fails to consult with the client as to the means by which they are to be pursued. In the case of a disagreement between the practitioner and the client, the practitioner should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the practitioner has a fundamental disagreement with the client, the practitioner may move to withdraw from the representation in compliance with applicable rules and regulations. Conversely, the client may resolve the disagreement by discharging the practitioner;

(q) Fails to act with reasonable diligence and promptness in representing a client.

(1) A practitioner's workload must be controlled and managed so that each matter can be handled competently.

(2) A practitioner has the duty to act with reasonable promptness. This duty includes, but shall not be limited to, complying with all time and filing limitations. This duty, however, does not preclude the practitioner from agreeing to a reasonable request for a postponement that will not prejudice the practitioner's client.

(3) A practitioner should carry through to conclusion all matters undertaken for a client, consistent with the scope of representation as previously determined by the client and practitioner, unless the client terminates the relationship or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations. If a practitioner has handled a proceeding that produced a result adverse to the client and the practitioner and the client have not agreed that the practitioner will handle the matter on appeal, the practitioner must consult with the client about the client's appeal rights and the terms and conditions of possible representation on appeal;

(r) Fails to maintain communication with the client throughout the duration of the client-practitioner relationship. It is the obligation of the practitioner to ensure that all necessary communications are in a language that the client understands. In order to properly maintain communication, the practitioner should:

(1) Promptly inform and consult with the client concerning any decision or circumstance with respect to which the client's informed consent is reasonably required;

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished. Reasonable consultation with the client includes the duty to meet with the client sufficiently in advance of a hearing or other matter to ensure adequate preparation of the client's case and compliance with applicable deadlines;

(3) Keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation; and

(4) Promptly comply with reasonable requests for information, except that in circumstances when a prompt response is not feasible, the practitioner, or a member of the practitioner's staff, should acknowledge receipt of the request and advise the client when a response may be expected;

(s) Fails to disclose to the adjudicator legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel;

(t) Fails to submit a signed and completed Notice of Entry of Appearance as Attorney or Representative in compliance with applicable rules and regulations when the practitioner:

(1) Has prepared, completed, or otherwise participated in the completion or submission of any pleading, application, motion, or other filing, and

(2) Has been deemed to have engaged in a pattern or practice of failing to submit such forms, in compliance with applicable rules and regulations. Notwithstanding the foregoing, in each case where the respondent is represented, every pleading, application, motion, or other filing shall be signed by the practitioner of record in his or her individual name; or

(u) Repeatedly files notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client.

7. Amend § 1003.103 by:

a. Revising the first sentence in paragraph (a)(1);

b. Adding a new sentence after the second sentence in paragraph (a)(2);

c. Revising the first and second sentences in paragraph (b) introductory text; and by

d. Revising paragraph (b)(2) introductory text.

The revisions and addition read as follows:

§ 1003.103 Immediate suspension and summary disciplinary proceedings; duty of practitioner to notify EOIR of conviction or discipline.

(a) *Immediate Suspension*—

(1) *Petition.* The Office of the General Counsel of EOIR shall file a petition with the Board to suspend immediately from practice before the Board and the Immigration Courts any practitioner who has been found guilty of, or pleaded guilty or nolo contendere to, a serious crime, as defined in § 1003.102(h), or any practitioner who has been suspended or disbarred by, or while a disciplinary investigation or proceeding is pending has resigned from, the highest court of any State, possession, territory, or Commonwealth of the United States, or the District of Columbia, or any Federal court, or who has been placed on an interim suspension pending a final resolution of the underlying disciplinary matter. * * *

(2) *Immediate suspension.* * * * If an immediate suspension is imposed upon a practitioner, the Board may require that notice of such suspension be posted at the Board, the Immigration Courts, or the DHS. * * *

(b) *Summary disciplinary proceedings.* The Office of the General Counsel of EOIR shall promptly initiate summary disciplinary proceedings against any practitioner described in paragraph (a) of this section by the issuance of a Notice of Intent to Discipline, upon receipt of a certified copy of the order, judgment, and/or record evidencing the underlying criminal conviction, discipline, or resignation, and accompanied by a certified copy of such document. However, delays in initiation of summary disciplinary proceedings under this section will not impact an immediate suspension imposed pursuant to paragraph (a) of this section. * * *

* * * * *

(2) In the case of a summary proceeding based upon a final order of disbarment or suspension, or a resignation while a disciplinary investigation or proceeding is pending (i.e., reciprocal discipline), a certified copy of a judgment or order of discipline shall establish a rebuttable presumption of the professional misconduct. Disciplinary sanctions shall follow in such a proceeding unless the attorney can rebut the presumption by demonstrating clear and convincing evidence that:

* * * * *

§ 1003.104 [Amended]

8. Amend § 1003.104(d) by removing the phrase "the Inspector General and, if appropriate, to the Federal Bureau of Investigation" and adding in its place the phrase "the Department of Homeland Security or the U.S. Attorney, and if appropriate, to the Inspector General, the Federal Bureau of Investigation, or other law enforcement agency".

9. Amend § 1003.105 by:

a. Revising paragraph (a);

b. Revising paragraph (c)(3);

c. Adding paragraph (c)(4); and by

d. Revising paragraph (d)(2), to read as follows:

§ 1003.105 Notice of Intent to Discipline.

(a) *Issuance of Notice to practitioner.* (1) If, upon completion of the preliminary inquiry, the Office of the General Counsel of EOIR determines that sufficient prima facie evidence exists to warrant charging a practitioner with professional misconduct as set forth in § 1003.102, it will file with the Board and issue to the practitioner who was the subject of the preliminary inquiry a Notice of Intent to Discipline. Service of this notice will be made upon the practitioner by either certified mail to his or her last known address, as defined in paragraph (a)(2) of this section, or by personal delivery. Such notice shall contain a statement of the charge(s), a copy of the preliminary inquiry report, the proposed disciplinary sanctions to be imposed, the procedure for filing an answer or requesting a hearing, and the mailing address and telephone number of the Board. In summary disciplinary proceedings brought pursuant to § 1003.103(b), a preliminary inquiry report is not required to be filed with the Notice of Intent to Discipline.

(2) For the purposes of this section, the last known address of a practitioner is the practitioner's address as it appears in EOIR's case management system if the practitioner is actively representing a party before EOIR on the date that the Office of the General Counsel for EOIR issues the Notice of Intent to Discipline. If the practitioner does not have a matter pending before EOIR on the date of the issuance of a Notice of Intent to Discipline, then the last known address for a practitioner will be as follows:

(i) *Attorneys in the United States:* The attorney's address that is on record with a state jurisdiction that licensed the attorney to practice law.

(ii) *Accredited representatives:* The address of a recognized organization with which the accredited representative is affiliated.

(iii) *Accredited officials:* The address of the embassy of the foreign government that employs the accredited official.

(iv) *All other practitioners:* The address for the practitioner that appears in EOIR's case management system for the most recent matter on which the practitioner represented a party.

* * * * *

(c) * * *

(3) *Request for hearing.* The practitioner shall also state in the answer whether he or she requests a hearing on the matter. If no request for a hearing is made, the opportunity for a hearing will be deemed waived. If a practitioner who is subject to summary disciplinary proceedings pursuant to § 1003.103(b) requests a hearing, he or she must make a prima facie showing to an adjudicating official, as set forth in § 1003.106, in the answer demonstrating either that:

(i) He or she can rebut the presumption of professional misconduct by establishing one or more of the exceptions set forth in § 1003.103(b)(2)(i) through (iii); or

(ii) Mitigating factors exist and should be considered with regard to the level of discipline to be imposed.

(4) *Failure to make prima facie showing.* Failure to make such a prima facie showing with respect to summary disciplinary proceedings pursuant to § 1003.103(b) shall result in the denial of the request for a hearing.

(d) * * *

(2) Upon such a default by the practitioner, the Office of the General Counsel for EOIR shall submit to the Board proof of service of the Notice of Intent to Discipline. The practitioner shall be precluded thereafter from requesting a hearing on the matter. The Board shall issue a final order adopting the proposed disciplinary sanctions in the Notice of Intent to Discipline unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted or not in the interests of justice. With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103, any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from any pending immigration matters and notifying immigration clients of the imposition of any sanction.

10. Amend § 1003.106 by:

a. Revising the section heading;

b. Revising the heading of paragraph (a);

c. Revising the first and second sentences of paragraph (a)(1)(ii),

d. Revising paragraphs (a)(1)(iii) and (a)(1)(iv);

e. Revising the first sentence of paragraph (a)(1)(v) introductory text;

f. Revising paragraph (a)(2) introductory text;

g. Revising paragraph (a)(2)(ii); and by

h. Revising paragraphs (b) and (c).

The revisions read as follows:

§ 1003.106 Right to be heard and disposition.

(a) *Right to be heard*—(1) * * *

(ii) Except as provided in § 1003.105(c)(3), upon the practitioner's request for a hearing, the adjudicating official may designate the time and place of the hearing with due regard to the location of the practitioner's practice or residence, the convenience of witnesses, and any other relevant factors. When designating the time and place of a hearing, the adjudicating official shall provide for the service of a notice of hearing, as the term "service" is defined in 8 CFR 1003.13, on the practitioner and the counsel for the government. * * *

(iii) The practitioner may be represented by counsel at no expense to the government. Counsel for the practitioner shall file a Notice of Entry of Appearance on Form EOIR–28 in accordance with the procedures set forth in this part. The practitioner shall have a reasonable opportunity to examine and object to evidence presented by the government, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the government.

(iv) In rendering a decision, the adjudicating official shall consider the following: The complaint, the preliminary inquiry report, the Notice of Intent to Discipline, the answer, any supporting documents, and any other evidence, including pleadings, briefs, and other materials. Counsel for the government shall bear the burden of proving the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline by clear and convincing evidence.

(v) The record of proceedings, regardless of whether an immigration judge or an administrative law judge is the adjudicating official, shall conform to the requirements of 8 CFR part 1003, subpart C and 8 CFR 1240.9. * * *

* * * * *

(2) *Failure to appear in proceedings.* If the practitioner requests a hearing as provided in section 1003.105(c)(3) but fails to appear, the adjudicating official shall then proceed and decide the case in the absence of the practitioner, in accordance with paragraph (b) of this section, based upon the available record, including any additional evidence or arguments presented by EOIR or DHS at the hearing. In such a proceeding, the Office of the General Counsel of EOIR or the Office of the Chief Counsel, United States Citizenship and Immigration Services, DHS, shall submit to the adjudicating official proof of service of the Notice of Intent to Discipline as well as the Notice of the Hearing. The practitioner shall be precluded thereafter from participating further in the proceedings. A final order of discipline issued pursuant to this paragraph shall not be subject to further review, except that the practitioner may file a motion to set aside the order, with service of such motion on the Office of the General Counsel of EOIR or the Office of the Chief Counsel, United States Citizenship and Immigration Services, DHS, whichever office

initiated the disciplinary proceedings, provided:

* * * * *

(ii) His or her failure to appear was due to exceptional circumstances (such as serious illness of the practitioner or death of an immediate relative of the practitioner, but not including less compelling circumstances) beyond the control of the practitioner.

(b) *Decision.* The adjudicating official shall consider the entire record and, as soon as practicable, render a decision. If the adjudicating official finds that one or more of the grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline have been established by clear and convincing evidence, he or she shall rule that the disciplinary sanctions set forth in the Notice of Intent to Discipline be adopted, modified, or otherwise amended. If the adjudicating official determines that the practitioner should be suspended, the time period for such suspension shall be specified. Any grounds for disciplinary sanctions enumerated in the Notice of Intent to Discipline that have not been established by clear and convincing evidence shall be dismissed. The adjudicating official shall provide for the service of a written decision or a memorandum summarizing an oral decision, as the term ''service'' is defined in 8 CFR 1003.13, on the practitioner and the counsel for the government. Except as provided in paragraph (a)(2) of this section, the adjudicating official's decision becomes final only upon waiver of appeal or expiration of the time for appeal to the Board, whichever comes first, nor does it take effect during the pendency of an appeal to the Board as provided in § 1003.6.

(c) *Appeal.* Upon the issuance of a decision by the adjudicating official, either party or both parties may appeal to the Board to conduct a review pursuant to § 1003.1(d)(3). Parties must comply with all pertinent provisions for appeals to the Board, including provisions relating to forms and fees, as set forth in Part 1003, and must use the Form EOIR–45. The decision of the Board is a final administrative order as provided in § 1003.1(d)(7), and shall be served upon the practitioner as provided in 8 CFR 1003.1(f). With the exception of cases in which the Board has already imposed an immediate suspension pursuant to § 1003.103, any final order imposing discipline shall not become effective sooner than 15 days from the date of the order to provide the practitioner opportunity to comply with the terms of such order, including, but not limited to, withdrawing from any pending immigration matters and notifying immigration clients of the imposition of any sanction. A copy of the final administrative order of the Board shall be served upon the Office of the General Counsel of EOIR and the Office of Chief Counsel, United States Citizenship and Immigration Services, DHS. If disciplinary sanctions are imposed against a practitioner (other than a private censure), the Board may require that notice of such sanctions be posted at the Board, the Immigration Courts, or DHS for the period of time during which the sanctions are in effect, or for any other period of time as determined by the Board.

* * * * *

11. Amend § 1003.107 by:

a. Removing the words ''clear, unequivocal, and convincing'' in the first sentence in paragraph (b)(1) and adding in their place the words ''clear and convincing''; and by

b. Adding a new paragraph (c), to read as follows:

§ 1003.107 Reinstatement after expulsion or suspension.

* * * * *

(c) *Appearance after reinstatement.* A practitioner who has been reinstated to practice by the Board must file a new Notice of Entry of Appearance of Attorney or Representative in each case on the form required by applicable rules and regulations, even if the reinstated practitioner previously filed such a form in a proceeding before the practitioner was disciplined.

PART 1292—REPRESENTATION AND APPEARANCES

12. The authority citation for part 1292 continues to read as follows:

Authority: 8 U.S.C. 1103, 1252b, 1362.

13. In § 1292.1, remove paragraph (a)(6) and revise paragraph (a)(2) introductory text, to read as follows:

§ 1292.1 Representation of others.

(a) * * *

(2) *Law students and law graduates not yet admitted to the bar.* A law student who is enrolled in an accredited U.S. law school, or a graduate of an accredited U.S. law school who is not yet admitted to the bar, provided that:

* * * * *

Dated: July 10, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8–17340 Filed 7–29–08; 8:45 am]

BILLING CODE 4410–30–P

FEDERAL RESERVE SYSTEM

12 CFR Part 203

[Regulation C; Docket No. R–1321]

Home Mortgage Disclosure

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; proposed staff interpretation.

SUMMARY: The Board is proposing to amend Regulation C (Home Mortgage Disclosure) to revise the rules for reporting price information on higher-priced loans. The rules would be conformed to the definition of ''higher-priced mortgage loan'' adopted by the Board under Regulation Z (Truth in Lending) contemporaneously with this proposal. Regulation C currently requires lenders to report the spread between the annual percentage rate (APR) on a loan and the yield on Treasury securities of comparable maturity if the spread meets or exceeds 3.0 percentage points for a first-lien loan (or 5.0 percentage points for a subordinate-lien loan). Under the proposal, a lender would report the spread between the loan's APR and a survey-based estimate of rates currently offered on prime mortgage loans of a comparable type if the spread meets or exceeds 1.5 percentage points for a first-lien loan (or 3.5 percentage points for a subordinate-lien loan).

DATES: Comments must be received by August 29, 2008.

ADDRESSES: You may submit comments, identified by Docket No. R–1321, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at: *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: John C. Wood, Counsel, or Paul Mondor, Senior Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452–3667 or (202) 452–2412. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background on HMDA and Regulation C

The Home Mortgage Disclosure Act (HMDA) requires depository and certain for-profit, nondepository institutions to collect, report to regulators, and disclose to the public data about originations and purchases of home mortgage loans (home purchase and refinancing) and home improvement loans, as well as loan applications that do not result in originations (for example, applications that are denied or withdrawn).

HMDA data can be used to help determine whether institutions are serving the housing needs of their communities. The data help public officials target public investment to attract private investment where it is needed. HMDA data also assist in identifying possible discriminatory lending patterns and in enforcing antidiscrimination statutes.

The Board's Regulation C implements HMDA. The data reported under Regulation C include, among other items, application date; loan type, purpose, and amount; the property location and type; the race, ethnicity, sex, and annual income of the loan applicant; the action taken on the loan application (approved, denied, withdrawn, etc.), and the date of that action; whether a loan is covered by the Home Ownership and Equity Protection Act (HOEPA); lien status (first lien, subordinate lien, or unsecured); and loan pricing (rate spread).[1]

HMDA and Regulation C were adopted in 1975, and have been amended numerous times over the years. The loan price reporting requirement was added in the most recent amendments and took effect beginning with the collection of data for calendar year 2004. (67 FR 7222, February 15, 2002; 67 FR 30771, May 8, 2002; and 67 FR 43218, June 27, 2002.) Institutions must report the difference between a loan's APR and the yield on Treasury securities of comparable maturity if that difference is 3.0 percentage points or more for a first-lien loan, or 5.0 percentage points or more for a subordinate-lien loan. If the rate spread for a loan is less than the 3.0 or 5.0 percentage point threshold, it is not reported. The Treasury yield used is as of the 15th day of a month most closely preceding the date the loan's interest rate was set by the institution for the final time before closing (rate lock date). The Board provides Treasury yields for various maturities, via the Federal Financial Institutions Examination Council (FFIEC) Web site, to assist institutions in calculating the rate spread.

II. Summary of Proposal

The Board is proposing a method for determining when price information is reported that is similar in concept to Regulation C's current method but different in the particulars. The proposed rule, like the current rule, would set a threshold above a market rate to trigger reporting. But the market rate the Board is proposing is different, and therefore so is the threshold. Instead of yields on Treasury securities of comparable maturity, the proposed rule would use a survey-based estimate of market rates for the lowest-risk prime mortgages, referred to as the ''average prime offer rate,'' for comparable types of transactions.

The survey the Board would rely on for the foreseeable future is the Primary Mortgage Market Survey® (PMMS) conducted by Freddie Mac. The Board would conduct its own survey if it became appropriate or necessary to do so. The reporting threshold would be set at 1.5 percentage points above the average prime offer rate for first-lien loans, and 3.5 points for subordinate-lien loans. The lender would report the difference between the transaction's APR and the average prime offer rate on a comparable type of transaction if the difference met or exceeded the threshold.

The proposed amendments are intended to facilitate regulatory compliance by conforming the test for rate spread reporting under Regulation C to the definition of higher-priced mortgage loans under Regulation Z. The proposed amendments will also provide better and more useful pricing data on higher-priced loans reported under Regulation C.

III. Reasons for Improving HMDA Rate Spread Reporting

Since the Board adopted Regulation C's reporting benchmark of yields on Treasury securities of comparable maturity, HMDA reporters and others have on various occasions identified shortcomings of this benchmark. Commenters to the January 2008 proposal under Regulation Z (73 FR 1672, January 9, 2008), under which the Board proposed to use Treasury yields as the benchmark to identify higher-priced loans warranting stricter regulations, again identified these shortcomings. Many of these commenters urged the Board to use a benchmark that more closely tracks mortgage rates. They also urged the Board to use the same test for these two purposes under Regulations C and Z, respectively. The Board considered these comments, conducted its own analysis, and concluded that both regulations should rely on a benchmark index that more closely tracks mortgage rates. Accordingly, this proposal would implement essentially the same rule the Board is adopting under Regulation Z.

A. Drawbacks of Using Treasury Security Yields

There are significant advantages to using Treasury yields to set the threshold for reporting price information. Treasuries are traded in a highly liquid market; Treasury yield data are published for many different maturities and can easily be calculated for other maturities; and the integrity of published yields is not subject to question. For these reasons, Treasuries are also commonly used in federal statutes, such as HOEPA, for benchmarking purposes.

As recent events have highlighted, however, using Treasury yields to set the APR threshold for HMDA rate spread reporting has two major disadvantages. The most significant disadvantage is that the spread between Treasuries and mortgage rates changes in the short term and in the long term. Moreover, the comparable Treasury security for a given mortgage loan is quite difficult to determine accurately.

The Treasury-mortgage spread can change for at least three different

[1] Institutions report these data to their supervisory agencies on an application-by-application basis using a register format. Institutions must make their loan/application registers available to the public, with certain fields redacted to preserve applicants' privacy. The Federal Financial Institutions Examination Council (FFIEC), on behalf of the supervisory agencies, compiles the reported data and prepares an individual disclosure statement for each institution, aggregate reports for all covered institutions in each metropolitan area, and other reports. These disclosure statements and reports are also available to the public.

reasons. First, credit risk may change on mortgages, even for the highest-quality borrowers. For example, credit risk increases when house prices fall. Second, competition for prime borrowers can increase, tightening spreads, or decrease, allowing lenders to charge wider spreads. Third, movements in financial markets can affect Treasury yields but have no effect on lenders' cost of funds or, therefore, on mortgage rates. For example, Treasury yields fall disproportionately more than mortgage rates during a ''flight to quality.''

Recent events illustrate how much the Treasury-mortgage spread can swing. The spread averaged about 170 basis points in 2007 but increased to an average of about 220 basis points in the first half of 2008. In addition, the spread was highly volatile in this period, swinging as much as 25 basis points in a week. Thus, the spread may vary significantly from time to time, and long-term predictions of future spreads are highly uncertain.

Changes in the Treasury-mortgage spread can undermine key objectives of the regulation. These changes mean that rate spreads for loans with identical credit risk are reported in some periods but not in others, contrary to the objective of consistent and predictable coverage over time. Moreover, lenders' uncertainty as to when such changes will occur can cause them to set an internal threshold below the regulatory threshold. This may reduce credit availability directly (if a lender's policy is not to make higher-priced loans, to avoid having to report loan pricing for them) or indirectly, by increasing regulatory burden. The recent volatility might lead lenders to set relatively conservative cushions.

Adverse consequences of volatility in the spread between mortgages rates and Treasuries could be reduced simply by setting the regulatory threshold at a high enough level to ensure exclusion of all prime loans. But a threshold high enough to accomplish this objective would likely fail to meet another, equally important objective of covering essentially all of the subprime market. Instead, the Board is proposing to use a benchmark index that more closely follows mortgage market rates, which would make any changes in the spread between mortgage rates and Treasuries largely academic.

The second major disadvantage of using Treasury yields to set the threshold is that the comparable Treasury security for a given mortgage loan is quite difficult to determine accurately. Regulation C determines the comparable Treasury security on the basis of maturity: a loan is matched to a Treasury with the same contract term to maturity. For example, the regulation matches a 30-year mortgage loan to a 30-year Treasury security. This method does not, however, account for the fact that very few loans reach their full maturity, and it causes significant distortions when the yield curve changes shape.[2] These distortions can bias coverage, sometimes in unpredictable ways, and consequently might influence the preferences of lenders to offer certain loan products in certain environments.

B. Reasons for Following the Regulation Z Final Rule

As noted above, the Board's objective in setting the rate spread reporting threshold has been to cover subprime mortgages and avoid covering prime mortgages. The same purpose underlies the definition of ''higher-priced mortgage loan'' the Board has just adopted under Regulation Z. For the reasons discussed in the Regulation Z final rule, the Board believes the definition under Regulation Z, if applied to Regulation C, would better achieve this purpose and ensure more consistent and more useful data. Moreover, using the same definition in both Regulation Z and Regulation C will relieve compliance burdens.

IV. The Board's Proposal

A. Rates From the Prime Mortgage Market

To address the principal drawbacks of Treasury security yields, discussed above, the Board is proposing a rule that relies instead on a rate that more closely tracks rates in the prime mortgage market. Proposed § 203.4(a)(12)(ii) would define an ''average prime offer rate'' as an annual percentage rate derived from average interest rates, points, and other pricing terms offered by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. Comparing a transaction's annual percentage rate to this average offered annual percentage rate, rather than to an average offered contract interest rate, should make reporting more accurate and consistent. If a loan's APR exceeds the average prime offer rate for a comparable transaction by 1.5 or more percentage points for a first-lien loan, or 3.5 or more percentage points for a subordinate-lien loan, the creditor would report the difference. (The basis for selecting these thresholds is explained further in part IV.B. below.) The lender would use the most recently available average prime offer rate as of the date on which the lender sets the rate for the final time before consummation.

To facilitate compliance, the proposed rule and commentary would provide that the Board will derive average prime offer rates from survey data according to a methodology it will make publicly available, and publish these rates in a table on the Internet on at least a weekly basis. This table would indicate how to identify a comparable transaction.

As noted above, the survey the Board intends to use for the foreseeable future is Freddie Mac's PMMS, which contains weekly average rates and points offered by a representative sample of creditors to prime borrowers seeking a first-lien, conventional, conforming mortgage and who would have at least 20 percent equity. The PMMS contains pricing data for four types of transactions: ''1-year ARM,'' ''5/1-year ARM,'' ''30-year fixed,'' and ''15-year fixed.'' For the two types of ARMs, PMMS pricing data are based on ARMs that adjust according to the yield on one-year Treasury securities; the pricing data include the margin and the initial rate (if it differs from the sum of the index and margin). These data are updated every week and are published on Freddie Mac's Web site (*see http://www.freddiemac.com/dlink/html/PMMS/display/PMMSOutputYr.jsp).*

The Freddie Mac PMMS is the most viable option for obtaining average prime offer rates. This is the only publicly available data source that has rates for more than one kind of fixed-rate mortgage (the 15-year and the 30-year) and more than one kind of variable-rate mortgage (the 1-year ARM and the 5/1-year ARM). Having rates on at least two fixed-rate products and at least two variable-rate products supplies a firmer basis for estimating rates for other fixed-rate and variable-rate products (such as a 20-year fixed or a 3/1 ARM).

Other publicly available surveys the Board considered are less suitable for the purposes of this proposal. Only one ARM rate is collected by the Mortgage Bankers Association's Weekly Mortgage Applications Survey and the Federal Housing Finance Board's Monthly Survey of Interest Rates and Terms on Conventional Single-Family Non-Farm Mortgage Loans. Moreover, the FHFB Survey has a substantial lag because it is monthly and reports rates on closed loans. The Board also evaluated two non-survey options involving Fannie

[2] Robert B. Avery, Kenneth P. Brevoort, and Glenn B. Canner (2006), ''Higher-Priced Home Lending and the 2005 HMDA Data,'' *Federal Reserve Bulletin,* vol. 92 (September 8), pp. A123–66.

Mae and Freddie Mac. One is the Required Net Yield, the prices these institutions will pay to purchase loans directly. The other is the yield on mortgage-backed securities issued by Fannie Mae and Freddie Mac. With either option, data for ARM yields would be difficult to obtain.

These other data sources, however, provide useful benchmarks to evaluate the accuracy of the PMMS. The PMMS has closely tracked these other indices, according to a Board staff analysis. The Board would continue to use them periodically to help it determine whether the PMMS remains an appropriate source of data for average prime offer rates. If the PMMS ceased to be available, or if circumstances arose that rendered it unsuitable for this rule, the Board would consider other alternatives including conducting its own survey.

The Board would use the pricing terms from the PMMS, such as interest rate and points, to calculate an annual percentage rate (consistent with Regulation Z, 12 CFR 226.22) for each of the four types of transactions that the PMMS reports. These annual percentage rates would be the average prime offer rates for transactions of those types. The Board would derive annual percentage rates for other types of transactions from the loan pricing terms available in the survey. The method of derivation the Board would use is being published as part of this proposal (*see* Attachment I to this **Federal Register** notice). When finalized, the method would be published on the Internet along with the table of annual percentage rates.

B. Threshold for Rate Spread Reporting

The Board is proposing a threshold of 1.5 percentage points above the average prime offer rate for a comparable transaction for first-lien loans and 3.5 percentage points for second-lien loans. These thresholds are the same as adopted under Regulation Z's definition of ''higher-priced mortgage loan.''

As discussed above, the rate spread reporting requirement was intended to cover the subprime market and generally exclude the prime market; and in the face of uncertainty it is appropriate to err on the side of covering somewhat more than the subprime market. Based on available data, it appears that the existing thresholds capture all of the subprime market and a portion of the alt-A market.[3] Based also on available data, the Board believes that the thresholds it is proposing would cover all, or virtually all, of the subprime market and a portion of the alt-A market. The Board considered loan-level origination data for the period 2004 to 2007 for subprime and alt-A securitized pools. The proprietary source of these data is FirstAmerican Loan Performance.[4] The Board also ascertained from a proprietary database of mostly government-backed and prime loans (McDash Analytics) that coverage of the prime market during the first three quarters of 2007 at these thresholds would have been very limited. The Board recognizes that the recent mortgage market disruption began at the end of this period, but it is the latest period the Board has been able to study in this database.

The Board is proposing a threshold for subordinate-lien loans of 3.5 percentage points. This is consistent with the existing rule under Regulation C, which sets the threshold over Treasury yields for these loans two percentage points above the threshold for first-lien loans. *See* 12 CFR 203.4(a)(12). The Board recognizes that it would be preferable to set a threshold for second-lien loans above a measure of market rates for second-lien loans, but it does not appear that a suitable measure of this kind exists. Although data are very limited, the Board believes it is appropriate to apply the same difference of two percentage points to the thresholds above market mortgage rates. As noted in the Regulation Z final rule, with rare exceptions, commenters explicitly endorsed, or at least did not raise any objection to, this approach in connection with that rulemaking; the Board is proposing to maintain consistency between the two rules.

The Board recognizes that there are limitations to making judgments about the future scope of this proposed rule based on past data. For example, once a final rule takes effect, the risk premiums for alt-A loans compared to the prime loans reported in the PMMS may be higher than the risk premiums for the period 2004–2007. In that case, coverage of alt-A loans would be higher than an estimate for that period would indicate.

Another important example is prime ''jumbo'' loans, or loans extended to borrowers with low-risk mortgage pricing characteristics, but in amounts that exceed the threshold for loans eligible for purchase by Freddie Mac or Fannie Mae. The PMMS collects pricing data only on loans eligible for purchase by one of these entities (''conforming loans''). Prime jumbo loans have always had somewhat higher rates than prime conforming loans, but the spread has widened significantly and become much more volatile since August 2007. If this spread remains wider and more volatile when this proposal takes effect in final form, the rule would cover a significant share of transactions that would be prime jumbo loans. While covering prime jumbo loans is not the Board's objective, the Board does not believe that it should set the threshold at a higher level to avoid what may be only temporary coverage of these loans relative to the long time horizon for this rule.

Credit risk and liquidity risk can vary by many factors, including geography, property type, and type of loan. This may suggest to some that different thresholds should be applied to different classes of transactions. This approach would make the regulation inordinately complicated and subject it to frequent revision, which would not be in the interest of creditors, investors, or consumers. Although the simpler approach the Board is proposing—just two thresholds, one for first-lien loans and another for subordinate-lien loans—has its disadvantages, the Board believes they would be outweighed by its benefits of simplicity and stability.

C. Timing of Determining the Reporting Threshold

Regulation C currently determines the threshold as of the 15th of the month before the rate is locked. This proposal would determine the threshold for a transaction on a more current basis. The proposal would require a creditor to use the most recent average prime offer rate available as of the rate lock date. As the PMMS is updated weekly, the Board will also update average prime offer rates weekly. The Board anticipates that using a more current benchmark will

[3] The percentage of the first-lien mortgage market on which Regulation C has required rate spread reporting using a threshold of three percentage points has been greater than the percentage of the total market originations that one industry source has estimated to be subprime (25 percent vs. 20 percent in 2005; 28 percent vs. 20 percent in 2006). For industry estimates see Inside Mortgage Finance Publications, Inc., *The 2007 Mortgage Market Statistical Annual* vol. 1, at 4. Regulation C's coverage of higher-priced loans is not thought, however, to have reached the prime market in those years. Rather, in both 2005 and 2006 it reached into the alt-A market, which the same source estimated to be 12 percent in 2005 and 13 percent in 2006. In 2004, Regulation C captured a significantly smaller part of the market than an industry estimate of the subprime market (11 percent vs. 19 percent), but that year's HMDA data were somewhat anomalous because of a steep yield curve.

[4] Annual percentage rates were estimated from the contract rates in these data using formulas derived from a separate proprietary database of subprime loans that collects contract rates, points, and annual percentage rates. This separate database, which contains data on the loan originations of eight subprime mortgage lenders, is maintained by the Financial Services Research Program at George Washington University.

improve reporting accuracy without increasing regulatory burden.

V. Effective Date

Under the final rule published simultaneously with this proposal, the Regulation Z amendments concerning higher-priced mortgage loans take effect on October 1, 2009. The Board contemplates that any final amendments to Regulation C under this rulemaking would take effect for data collection beginning January 1, 2009. Switching rules for HMDA rate spread reporting in the middle of a calendar year would make the data more difficult to use and interpret. If the Board were to make it effective January 1, 2010, lenders would be required to report HMDA data in 2009 using the old (current) rule based on Treasury security yields while, in October through December of 2009, determining applicability of the Regulation Z higher-priced mortgage loan provisions using the new rule based on average prime offer rates. An effective date of January 1, 2009 would ensure that lenders would not need to maintain two separate systems for determining higher-priced mortgage loans during the final quarter of 2009.

If a loan were consummated on or after January 1, 2009, the lender would be required to determine whether the loan is higher-priced (and, if so, report the rate spread) using the new rule, while if the loan were consummated before January 1, 2009 the lender would continue to use the old (current) rule. The Board recognizes that some loans that close in 2009 will have had their rates locked sometime in 2008 (or earlier). Thus, some loans that close in 2009 (and accordingly would be reported on a lending institution's HMDA report for calendar year 2009) would require a creditor to use pre-2009 average prime offer rates to determine their rate spreads. To address this issue, the Board would publish average prime offer rates on the Internet dating from the beginning of October 2008, which lenders could use for loans that are locked in on or after October 1, 2008 but originated in 2009. Lenders that locked in a rate prior to October 1, 2008 but originated the loan in 2009 (or later) would determine whether and how to report price information for such loans using the old (current) rule. To help data users identify these loans, the Board contemplates adding a notation to each such loan in the publicly available data report for 2009 (based on application date, as the closest available proxy for rate-lock date). The Board expects such loans to comprise a very small percentage (one percent or less) of the 2009 HMDA data, based on staff analysis of past years' data.

VI. Requests for Comment

The Board requests comments on (1) the proposal to change the reporting benchmark from Treasury yields to average prime offer rates; (2) the Board's plan to use the Freddie Mac PMMS to estimate average prime offer rates, including comment on whether there are more appropriate sources of data; (3) the method the Board proposes to use to derive average prime offer rates from the PMMS data, which is being published as Attachment I to this proposal; (4) the proposed 1.5 and 3.5 percentage point thresholds; (5) the proposed timing for rate spread determination (rate-lock date, with weekly updating of the average prime offer rate benchmarks); (6) the proposed effective date of these amendments; and (7) the costs and benefits of the proposal generally.

VII. Paperwork Reduction Act

In accordance with section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 35; 5 CFR part 1320 appendix A.1), the Board has reviewed the proposed rule under the authority delegated to the Board by Office of Management and Budget (OMB). The Board may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB number. The OMB control number is 7100–0247.

The information collection requirements that would be revised by this rulemaking appear in 12 CFR part 203. The information collection is mandatory under 12 U.S.C. 2801–2810. It generates data used to help determine whether financial institutions are serving the housing needs of their communities, to help target investment to promote private investment where it is needed, and to provide data to assist in identifying possibly discriminatory lending patterns and in enforcing antidiscrimination statutes.

The respondents are all types of financial institutions that meet the tests for coverage under the regulation. Under the Paperwork Reduction Act (PRA), however, the Board accounts for the burden of the paperwork associated with the regulation only for state member banks, their subsidiaries, subsidiaries of bank holding companies, U.S. branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act (12 U.S.C. 601–604a; 611–631). Other federal agencies account for the paperwork burden for the institutions they supervise. Respondents must maintain their loan/application registers and modified registers for three years, and their disclosure statements for five years.

The Board has determined that the data collection and reporting are required by law; completion of the loan/application register, submission to the Board, and disclosure to the public upon request are mandatory. The data, as modified according to the regulation, are made publicly available and are not considered confidential. Information that might identify an individual borrower or applicant is given confidential treatment under exemption 6 of the Freedom of Information Act (5 U.S.C. 552(b)(6)).

The current total annual burden to comply with the provisions of Regulation C is estimated to be 156,910 hours for 680 Board-regulated institutions that are deemed to be respondents for the purposes of the PRA. The reporting, recordkeeping, and disclosure burden for this information collection is estimated to vary from 12 to 12,000 hours per respondent per year, with an average of 242 hours for state member banks and an average of 192 hours for mortgage banking subsidiaries and other respondents. This estimated burden includes time to: Gather and maintain the data needed, review the instructions, and complete the register. The Board estimates that respondents regulated by the Board would take, on average, 16 hours (two business days) to revise and update their systems to comply with the proposed threshold for rate spread reporting. This one-time revision would increase the burden by 10,880 hours to 167,790.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility; (2) the accuracy of the Board's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 151–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0247), Washington, DC 20503.

VIII. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) generally requires an agency to perform an assessment of the impact a rule is expected to have on small entities. However, under section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

A. Statement of the Objectives of and Legal Basis for the Proposal

The Board is proposing amendments to Regulation C to make the rules for reporting higher-priced loans in the annual Home Mortgage Disclosure Act (HMDA) data consistent with the definition of higher-priced loan in the amendments to Regulation Z (Truth in Lending) that the Board is adopting in final form. The amendments are intended to reduce regulatory burden by allowing mortgage lenders to use a single definition of higher-priced loan, rather than different definitions under the two regulations. The amendments are also intended to result in more useful HMDA data because the new definition of higher-priced loan uses a survey-based estimate of market mortgage rates as the benchmark for reporting.

The purpose of HMDA is to provide to public officials, and to the public, information to enable them to determine whether lending institutions are fulfilling their obligations to serve the housing needs of their communities. The purpose of the law is also to assist public officials in determining the distribution of public sector investments in a manner designed to improve the private investment environment. HMDA data also assist in identifying possibly discriminatory lending patterns and in enforcing antidiscrimination statutes. 12 U.S.C. 2801(b). HMDA authorizes the Board to prescribe regulations to carry out the purposes of the statute. 12 U.S.C. 2804(a).

The act expressly states that the Board's regulations may contain ''such classifications, differentiations, or other provisions * * * as in the judgment of the Board are necessary and proper to effectuate the purposes of [HMDA], and prevent circumvention or evasion thereof, or to facilitate compliance therewith.'' 12 U.S.C. 2804(a). The Board believes that the amendments to Regulation C discussed above are within Congress's broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute.

B. Small Entities Affected by the Proposal

The proposed rule would apply to all institutions that are required to report under HMDA. The Board does not have complete data on the asset sizes of all HMDA reporting institutions. Through data from Reports of Condition and Income (''call reports'') of depository institutions and certain subsidiaries of banks and bank holding companies, however, the Board can determine numbers of small entities among those categories. For the majority of HMDA respondents that are non-depository institutions exact asset size information is not available. The Board has somewhat reliable estimates based in large measure on self-reporting from approximately five percent of the non-depository respondents. Based on the best information available for each category of respondent, the Board makes the following estimate of small entities that would be affected by this proposal: Of all HMDA respondents in 2008 (for 2007 activities), which number approximately 8,625, approximately 4,520 had total domestic assets of $165 million or less and thus would be considered small entities for purposes of the Regulatory Flexibility Act.

C. Other Federal Rules

The Board believes no federal rules duplicate, overlap, or conflict with the proposed revisions to Regulation C. However, the Board solicits comment on this matter.

D. Significant Alternatives to the Proposed Revisions

The Board solicits comment on any significant alternatives that may provide additional ways to reduce regulatory burden associated with this proposed rule.

IX. Solicitation of Comments Regarding the Use of ''Plain Language''

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use ''plain language'' in all proposed and final rules published after January 1, 2000. The Board invites comments on whether the proposed rules are clearly stated and effectively organized, and how the Board might make the proposed text easier to understand.

List of Subjects in 12 CFR Part 203

Banks, Banking, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions to the text of Regulation C, Appendix A, and the Official Staff Commentary. New language is shown inside bold arrows, while language that would be deleted is set off in brackets.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR part 203 as follows:

PART 203—HOME MORTGAGE DISCLOSURE (REGULATION C)

1. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 2801–2810.

2. Section 203.4 is amended by revising paragraph (a)(12) to read as follows:

§ 203.4 Compilation of loan data.

(a) * * *

(12) ►(i)◄ For originated loans subject to Regulation Z, 12 CFR part 226, the difference between the loan's annual percentage rate (APR) and the [yield on Treasury securities having comparable periods of maturity] ►average prime offer rate for a comparable transaction as of the date the interest rate is set◄, if that difference is equal to or greater than [3] ►1.5◄ percentage points for loans secured by a first lien on a dwelling, or equal to or greater than [5] ►3.5◄ percentage points for loans secured by a subordinate lien on a dwelling. [The lender shall use the yield on Treasury securities as of the 15th day of the preceding month if the rate is set between the 1st and the 14th day of the month and as of the 15th day of the current month if the rate is set on or after the 15th day, as prescribed in appendix A to this part.]

►(ii) ''Average prime offer rate'' means an annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage loans that have low-risk pricing characteristics. The Board publishes average prime offer rates for a broad range of types of mortgage in a table updated at least weekly as well as the methodology the Board uses to derive these rates.◄

* * * * *

3. In appendix A to part 203, under I. Instructions for Completion of Loan/Application Register, paragraphs I.G.1. and I.G.2. are revised to read as follows:

Appendix A to Part 203—Form and Instructions for Completion of HMDA Loan/Application Register

* * * * *

I. Instructions for Completion of Loan/Application Register

* * * * *

G. Pricing-Related Data

1. Rate Spread

a. For a home-purchase loan, a refinancing, or a dwelling-secured home improvement loan that you originated, report the spread between the annual percentage rate (APR) and the ►average prime offer rate for a comparable transaction◄ [applicable Treasury yield] if the spread is equal to or greater than ►1.5◄ [3] percentage points for first-lien loans or ►3.5◄ [5] percentage points for subordinate-lien loans. To determine whether the rate spread meets this threshold, use the ►average prime offer rate for the type of transaction, pursuant to § 203.4(a)(12) and staff commentary thereunder, as of the date◄ [Treasury yield for securities of a comparable period of maturity as of the 15th day of a given month, depending on when] the interest rate was set, and use the APR for the loan, as calculated and disclosed to the consumer under § 226.6 or 226.18 of Regulation Z (12 CFR part 226). Use the ►most recently available average prime offer rate.◄ [15th day of a given month for any loan on which the interest rate was set on or after that 15th day through the 14th day of the next month. (For example, if the rate is set on September 17, 2004, use the Treasury yield as of September 15, 2004; if the interest rate is set on September 3, 2004, use the Treasury yield as of August 15, 2004). To determine the applicable Treasury-security yield, the financial institution must use] ►Current and historic average prime offer rates are set forth in◄ the table published on the FFIEC's Web site (*http://www.ffiec.gov/hmda*) entitled ►''Average Prime Offer Rates.''◄ [''Treasury Securities of Comparable Maturity under Regulation C.'']

* * * * *

d. Enter the rate spread to two decimal places, and use a leading zero. For example, enter 03.29. If the difference between the APR and the ►average prime offer rate◄ [Treasury yield] is a figure with more than two decimal places, round the figure or truncate the digits beyond two decimal places.

e. If the difference between the APR and the ►average prime offer rate◄ [Treasury yield] is less than ►1.5◄ [3] percentage points for a first-lien loan and less than ►3.5◄ [5] percentage points for a subordinate-lien loan, enter ''NA.''

2. *Date the interest rate was set.* The relevant date to use to determine the ►average prime offer rate for a comparable transaction◄ [Treasury yield] is the date on which the loan's interest rate was set by the financial institution for the final time before closing. If an interest rate is set pursuant to a ''lock-in'' agreement between the lender and the borrower, then the date on which the agreement fixes the interest rate is the date the rate was set. If a rate is re-set after a lock-in agreement is executed (for example, because the borrower exercises a float-down option or the agreement expires), then the relevant date is the date the rate is re-set for the final time before closing. If no lock-in agreement is executed, then the relevant date is the date on which the institution sets the rate for the final time before closing.

* * * * *

4. In Supplement I to Part 203, under *Section 203.4—Compilation of Loan Data, 4(a) Data Format and Itemization, Paragraph 4(a)(12) Rate spread information,* paragraph 4(a)(12)–1 is removed, new heading *Paragraph 4(a)(12)(ii)* is added, and new paragraphs 4(a)(12)(ii)–1, –2, and –3 are added, to read as follows:

Supplement I to Part 203—Staff Commentary

* * * * *

Section 203.4—Compilation of Loan Data

4(a) Data Format and Itemization

* * * * *

Paragraph 4(a)(12) Rate spread information.

[1] *Treasury securities of comparable maturity.* To determine the yield on a Treasury security, lenders must use the table entitled ''Treasury Securities of Comparable Maturity under Regulation C,'' which will be published on the FFIEC's Web site (*http://www.ffiec.gov/hmda*) and made available in paper form upon request. This table will provide, for the 15th day of each month, Treasury security yields for every available loan maturity. The applicable Treasury yield date will depend on the date on which the financial institution set the interest rate on the loan for the final time before closing. See appendix A, Paragraphs I.G.1. and 2.]

►*Paragraph 4(a)(12)(ii)*

1. *Average prime offer rate.* Average prime offer rates are annual percentage rates derived from average interest rates, points, and other loan pricing terms offered to borrowers by a representative sample of lenders for mortgage loans that have low-risk pricing characteristics. Other pricing terms include commonly used indices, margins, and initial fixed-rate periods for variable-rate transactions. Relevant pricing characteristics include a consumer's credit history and transaction characteristics such as the loan-to-value ratio, owner-occupant status, and purpose of the transaction. To obtain average prime offer rates, the Board uses a survey of lenders that both meets the criteria of § 203.4(a)(12)(ii) and provides pricing terms for at least two types of variable-rate transactions and at least two types of non-variable-rate transactions. An example of such a survey is the Freddie Mac Primary Mortgage Market Survey®.

2. *Comparable transaction.* The rate spread reporting requirement applies to a consumer credit transaction that is secured by the consumer's principal dwelling with an annual percentage rate that exceeds by the specified margin the average prime offer rate for a comparable transaction as of the date the interest rate is set. The table of market mortgage rates published by the Board indicates how to identify the comparable transaction.

3. *Board table.* The Board publishes on the Internet, in table form, average prime offer rates for a wide variety of transaction types. The Board calculates an annual percentage rate, consistent with Regulation Z (see 12 CFR 226.22 and part 226, appendix J), for each transaction type for which pricing terms are available from a survey. The Board estimates annual percentage rates for other types of transactions for which direct survey data are not available based on the loan pricing terms available in the survey and other information. The Board publishes on the Internet the methodology it uses to arrive at these estimates.◄

* * * * *

By order of the Board of Governors of the Federal Reserve System, July 15, 2008.

Jennifer J. Johnson,

Secretary of the Board.

Attachment I—Methodology for Determining Average Prime Offer Rate

The calculation of the Average Prime Offer Rate (APOR) is based on the Freddie Mac Primary Mortgage Market Survey® (PMMS). The survey collects data for a hypothetical ''best quality'' 80% LTV 1st lien for four mortgage products: (1) 30-year fixed-rate; (2) 15-year fixed-rate; (3) one-year variable-rate; and (4) five-year variable-rate. Each of the variable-rate products is assumed to adjust to an index based on the 1-year Treasury rate plus a margin and to adjust annually after the initial fixed-rate period.

The PMMS collects nationwide average offer prices during the Monday through Wednesday period each week and releases the averages on Thursday. For each loan type the average commitment loan rate and fees and points are reported, each expressed as percentages of the initial loan balance. For the fixed-rate products the commitment rate is the contract rate on the loan; for the variable-rate products it is the initial loan rate. For the variable-rate products, the average index margin is also reported (also expressed in percentage points).

The information provided by the PMMS survey is sufficient to compute an annual percentage rate (APR) for the 30- and 15-year fixed-rate products. However, additional information is needed for the two variable-rate products. Specifically, an estimate of the fully indexed rate (the sum of the index and margin, without regard for any temporary discount or premium) is needed. For the two variable-rate products, the fully indexed rate is calculated as the margin (collected in the survey) plus the future one-year Treasury rate, which is estimated by the current one-year Treasury rate.

The Board uses the rates prevailing during the three-day period in which the PMMS is conducted. Specifically, the average of the close-of-business one-year Treasury rates for Monday, Tuesday, and Wednesday of the survey week is used as the estimate of the ''current'' Treasury rate used for the fully-indexed component of the variable-rate APR calculations. (If data are available for fewer than three days, then only yields for the available days are used for the average.)

Survey data on the initial interest rate, fees and points, and the calculated fully indexed rate, are sufficient to compute an APR for the one- and five-year variable-rate mortgage products in the PMMS. In computing the APR a fully amortizing loan is assumed, with monthly compounding (similar assumptions are made for the fixed-rate products) and with a two-percentage-point cap in the annual interest rate adjustment.

The PMMS data provide information for only a subset of mortgage products. Specifically, the survey does not cover fixed-rate loans with terms of less than 15 years nor does it cover variable-rate rate mortgages with adjustment periods of other than one or five years. The Board uses interpolation techniques to estimate APRs for an additional range of products. The interpolation techniques rely on the relative yields of different Treasury products.

Currently, yields are tracked for Treasury securities with terms of: one, two, three, five, seven, and ten years. The Board uses these data to estimate APRs for two-, three-, seven-, and ten-year variable-rate rate mortgages which are identical to the one- and five-year variable-rate products surveyed in PMMS in all respects except the length of the initial interest rate period. The specific estimation technique is as follows.

The margin and fees and points for each interpolated variable-rate product are estimated as weighted averages of the margins and fees and points of the one-year and five-year variable-rate products reported in the PMMS. For the two-year variable-rate loan the weights are ¾ for the one-year variable-rate and ¼ for the five-year. For the three-year variable-rate product, the weights are ½ for both. For the seven- and ten-year variable-rate products, only the margin and fees and points of the five-year variable-rate are used.

The initial interest rate for each of the interpolated variable-rate products is estimated by a two-step process. First, a Treasury spread is computed as the weighted average of the spread between the initial interest on the one-year and five-year PMMS variable-rate products and the one- and five-year Treasury yields respectively. The weights used are the same as those used in the margin and fees and points calculations. The Treasury rates are taken from the Monday–Wednesday close-of-business averages cited above.

The second step is to add the Treasury spreads calculated from the PMMS data to the Treasury yield for the appropriate term. Thus, for example, for the two-year variable-rate product, the estimated spread is added to the two-year Treasury rate, while the ten-year Treasury rate is used for the ten-year variable-rate estimate.

Thus estimated, the initial rates, margins, points and fees are used to calculate a fully indexed rate and ultimately an APR for the two-, three-, seven- and ten-year variable-rate products.

To calculate APRs for fixed-rate loans with terms of ten years or less, the Board uses the initial interest rates (and fees and points) of the one-, two-, three-, five-, seven-, and ten-year variable-rate loan products calculated above to estimate APRs for fixed-rate loans with a term of one, two, three, five, seven, and ten years respectively.

Altogether the Board estimates APRs for ten additional products (two-, three-, seven-, and ten-year 30-year term variable-rates and one-, two-, three-, five-, seven-, and ten-year fixed-rate term loans) to use along with the four products directly surveyed in the PMMS. If survey data become available for any of the ten interpolated products, survey-based inputs will be used instead of the estimates. These 14 products cover most mortgages in current use. Assignment rules allow coverage of all other products.

For example, a four-year variable-rate loan will be matched to the five-year variable-rate product threshold APR; a six-year to the seven-year and any variable-rate loan with a repricing interval of more than seven years will be matched to the ten-year variable-rate product threshold APR. Similar assignments will be used for fixed-rate loans, with any fixed-rate loan with a term of more than 15 years matched to the 30-year fixed-rate product threshold APR and loans with terms between ten and 15 years matched to the 15-year fixed-rate loan threshold APR.

All of the information needed for the above calculations is publicly available on Thursday morning of each week. APRs for each of the 14 products are posted on the FFIEC Web site by Thursday night. All loans locking from Friday through the following Thursday use these APRs as the basis of their spread calculations.

Example:

The week of May 15, 2008 is used to illustrate the threshold APR methodology. On Thursday, May 15th, Freddie Mac released the following PMMS information reflecting national mortgage rate averages for the three day period May 12 to May 14 (each variable is expressed in percentage points):

30-year fixed-rate:	
Contract rate	6.01
Fees & Points	0.6
15-year fixed-rate:	
Contract rate	5.60
Fees & Points	0.5
Five-year variable-rate:	
Initial rate	5.57
Fees & Points	0.6
Margin	2.75
One-year variable-rate:	
Initial rate	5.18
Fees & Points	0.7
Margin	2.75

The Freddie Mac survey contract rate and points and fees for the 30-year and 15-year fixed-rate mortgages are sufficient to compute an APR for these two products. The APR is calculated assuming full amortization with one-month compounding. The calculated APRs are:

30-year fixed-rate	6.07
15-year fixed-rate	5.68

Additional information on the assumed fully-indexed rate is needed in order to calculate APRs for the one-year and five-year variable-rate products. Average close-of-business Treasury yields for the three days in which the survey was conducted are used for these calculations:

May 12th:	
One-year Treasury	2.01
Two-year Treasury	2.30
Three-year Treasury	2.54
Five-year Treasury	3.00
Seven-year Treasury	3.34
Ten-year Treasury	3.78
May 13th:	
One-year Treasury	2.08
Two-year Treasury	2.47
Three-year Treasury	2.70
Five-year Treasury	3.17
Seven-year Treasury	3.49
Ten-year Treasury	3.90

May 14th:	
One-year Treasury	2.11
Two-year Treasury	2.53
Three-year Treasury	2.78
Five-year Treasury	3.22
Seven-year Treasury	3.50
Ten-year Treasury	3.92
Averaging these figures for the three days implies Treasury yields of:	
One-year Treasury	2.07
Two-year Treasury	2.43
Three-year Treasury	2.67
Five-year Treasury	3.13
Seven-year Treasury	3.44
Ten-year Treasury	3.87

The fully-indexed rate (the estimated interest rate after one-year) for the one-year variable-rate mortgage is calculated as the appropriate Treasury yield plus the margin: 2.07 + 2.75 = 4.82. Similarly, the fully-indexed rate (the estimated interest rate after five-years) for the five-year variable-rate mortgage is calculated as: 3.13 + 2.75 = 5.88.

The initial rate, fees and points, and fully-indexed rate are sufficient to compute APRs for the one-year and five-year variable-rate products. Full amortization, monthly compounding, and a two-percentage-point cap in the annual change in rates are assumed. The calculated APRs are:

One-year variable-rate rate	4.91
Five-year variable-rate rate	5.82

Data for the interpolated two-year and three-year variable-rate mortgages are calculated as weighted averages of the figures for the one- and five-year variable-rates which is used in conjunction with the yields on the two- and three-year Treasuries as follows:

Two-year variable-rate:	
Initial rate	[3×(5.18 − 2.07) + 1×(5.57 − 3.13)]/4 + 2.43 = 5.37
Fees & Points	[3×.7 + 1×.6]/4 = .7
Margin	[3×2.75 + 1×2.75]/4 = 2.75
Fully-indexed rate	2.75 + 2.43 = 5.18
Three-year variable-rate:	
Initial rate	[2×(5.18 − 2.07) + 2×(5.57 − 3.13)]/4 + 2.67 = 5.45
Fees & Points	[2×.7 + 2×.6]/4 = .7
Margin	[2×2.75 + 2×2.75]/4 = 2.75
Fully-indexed rate	2.75 + 2.67 = 5.42

Full amortization, monthly compounding, and a two-percentage-point cap in the annual change in rates yields calculated APRs of:

Two-year variable-rate rate	5.27
Three-year variable-rate rate	5.49

APRs for seven-year and ten-year variable-rate mortgages are estimated using the survey data for the five-year variable-rate and yields on the seven- and ten-year Treasuries:

Seven-year variable-rate:	
Initial rate	(5.57 − 3.13) + 3.44 = 5.88
Fees & Points	= .6
Margin	= 2.75
Fully-indexed rate	2.75 + 3.44 = 6.19
Ten-year variable-rate:	
Initial rate	(5.57 − 3.13) + 3.87 = 6.31
Fees & Points	= .6
Margin	= 2.75
Fully-indexed rate	2.75 + 3.87=6.62

Full amortization, monthly compounding, and a two-percentage-point cap in the annual change in rates yields calculated APRs of:

Seven-year variable-rate rate	6.09
Ten-year variable-rate rate	6.47

The initial rate and fees and points of the variable-rate mortgages calculated above are used to estimate threshold APRs for fixed-rate products with terms of ten years or less. The estimates are as follows:

One-year fixed:	
Initial rate	5.18
Fees & Points	.7
APR	5.96
Two-year fixed:	
Initial rate	5.37
Fees & Points	.7
APR	6.06
Three-year fixed:	
Initial rate	5.45
Fees & Points	.7
APR	5.92
Five-year fixed:	
Initial rate	5.57
Fees & Points	.6
APR	5.82
Seven-year fixed:	
Initial rate	5.88
Fees & Points	.6
APR	6.06
Ten-year fixed:	
Initial rate	6.31
Fees & Points	.6
APR	6.44

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BILLING CODE 6210–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 702 and 704

RIN 3133–AD43

Prompt Corrective Action; Amended Definition of Post-Merger Net Worth

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: NCUA requests public comment on a proposed rule implementing a statutory amendment to the definition of a natural person credit union's ''net worth'' that applies solely to NCUA's system of regulatory capital standards, known as ''prompt corrective action.'' The amendment expands the definition of ''net worth'' to allow the acquiring credit union, in a merger of natural person credit unions, to include the merging credit union's retained earnings with its own to determine the acquirer's post-merger ''net worth.'' In a merger of corporate credit unions, the proposed rule similarly redefines corporate credit union capital to allow an acquiring credit union to include with its capital the retained earnings of the merging credit union to determine the acquirer's post-merger capital.

DATES: Comments must be received on or before September 29, 2008.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.

• *E-mail:* Address to *regcomments@ncua.gov.* Include ''[Your name]—

Comments on Notice of Proposed Rulemaking for Parts 702 and 704'' in the e-mail subject line.

• *Fax:* (703) 518–6319. Use the subject line described above for e-mail.

• *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT: *Technical:* Karen Kelbly, Chief Accountant, Office of Examination and Insurance, at the above address or by telephone: 703/518–6389; *Legal:* Steven W. Widerman, Trial Attorney, Office of General Counsel, at the above address or by telephone: 703/518–6557.

SUPPLEMENTARY INFORMATION:

A. Background

1. Natural Person Credit Unions

a. *Prompt Corrective Action.* In 1998, Congress enacted the Credit Union Membership Access Act (''CUMAA''), Public Law 105–219, 112 Stat. 913 (1998). CUMAA amended the Federal Credit Union Act to mandate a system of regulatory capital standards called ''prompt corrective action'' (''PCA'' or ''regulatory capital'') consisting of minimum capital standards and corresponding remedies to improve the net worth of federally-insured ''natural person'' credit unions. 12 U.S.C. 1790d *et seq.* In 2000, the NCUA Board implemented a comprehensive system of PCA primarily under part 702.[1] 12 CFR 702 *et seq.*

A credit union's ''net worth ratio'' determines its classification among five statutory net worth categories. 12 U.S.C. 1790d(c); 12 CFR 702.102. As a credit union's classification among these categories declines, it is subject to an expanding range of PCA remedies to restore its net worth. These remedies consist of four mandatory supervisory actions prescribed by statute, 12 U.S.C. 1790d(e)–(g), and a series of discretionary supervisory actions developed by NCUA. 12 CFR 702.204(b).

CUMMA defines a natural person credit union's ''net worth ratio'' as the ratio of its net worth to its total assets. 12 U.S.C. 1790d(o)(3). For regulatory capital purposes,[2] it expressly limits a credit union's net worth to ''the retained earnings balance of the credit union, as determined under generally accepted accounting principles [''GAAP''].'' 12 U.S.C. 1790d(o)(2)(A) (1998).[3] ''Not anticipating the consequences this rule addresses, the CUMAA net worth definition thus incorporated GAAP by reference generally, subject to future amendments and interpretations; it did not incorporate GAAP as a snapshot that preserved what GAAP then prescribed or how it was then interpreted.

b. *Financial Reporting of Mergers Between Mutual Enterprises.* GAAP pertaining to credit union mergers were originally embodied in the financial reporting rules for business combinations established by the Accounting Principles Board's (''APB'') Opinion No. 16, *Business Combinations* (1970) (''Opinion 16''). At the time CUMAA mandated PCA, the predominant practice for financial reporting of a credit union merger, whether of natural person or corporate credit unions, was to apply the ''pooling method.'' That method required an acquiring or continuing credit union (''acquiring credit union'') to combine with its own financial statement components the like components of the merging credit union. Consistent with the limited statutory definition of net worth, that method allowed an acquiring credit union to combine its own retained earnings with that of the merging credit union for purposes of measuring the acquirer's post-merger net worth ratio. The ''pooling method'' presumed that the retained earnings of the merging credit union flowed forward to the acquirer's financial statement, thus qualifying it as retained earnings of the acquirer.

The ''pooling method,'' in conjunction with the statutory definition of net worth, provided an incentive to merge because it allowed the acquiring credit union to combine the merging credit union's retained earnings, thus enhancing the acquirer's post-merger net worth. From a regulatory standpoint, the acquisition of an operationally troubled credit union by one that will be well capitalized as a result is a preferable alternative to conserving or liquidating the troubled credit union.

In 2001, the Financial Accounting Standards Board (''FASB'')—successor to the APB—replaced Opinion 16 as the source of GAAP for business combinations other than those between mutual enterprises with its Financial Accounting Statement No. 141, *Business Combinations* (2002) (''FAS 141''). FAS 141 replaced the ''pooling method'' of financial reporting of business combinations with the ''purchase method'' effective in June 30, 2001.

c. *Deferment of ''Acquisition Method'' for Mutual Combinations.* For mergers between mutual enterprises (''mutual combinations'') such as credit unions, FASB deferred the 2001 effective date of FAS 141 pending the outcome of its project on *Combinations Between Mutual Enterprises,* which explored a ''differences-based approach'' to mutual combinations. FAS 141 at ¶ 60. While the FAS 141 deferment for mutual combinations is pending, Opinion 16 continues to apply, and credit unions continue to use the ''pooling method'' of financial reporting of credit union mergers. But that deferment will expire at the end of 2008.

In December 2007, FASB decided that its revised method of financial reporting for business combinations should apply equally to mutual combinations and to combinations between other for-profit enterprises. Financial Accounting Statement No. 141(R), *Business Combinations* (2007) (''FAS 141(R)'') at ¶ 74. FAS 141(R) will apply to mutual combinations that take place in fiscal years beginning after December 15, 2008. In conjunction with the limited statutory definition of net worth, the net effect of FAS 141(R) is to mandate the ''purchase method'' of financial reporting—which it renamed the ''acquisition method''—for credit union mergers, resulting in the exclusion of a merging credit union's retained earnings from the post-merger net worth of an acquiring credit union.

d. *Acquisition Versus Pooling Method of Financial Reporting.* The ''acquisition method'' of financial reporting for credit unions would require the fair value of the net assets acquired in a merger to be classified as a direct addition to the acquirer's equity, not as an addition to its retained earnings. FAS 141(R) at ¶ A67. Because credit unions cannot count additions of equity in their net worth—which is limited by definition to GAAP retained earnings—an acquirer's net worth will not increase as the result of a merger. Moreover, the ''acquisition method'' may well reduce an acquirer's post-merger net worth because, as a ratio of total assets, it will be diluted by the addition and fair valuation of assets (*i.e.*, the denominator of the ratio) acquired in the merger.

Whereas the ''pooling method'' of financial reporting, when applied in conjunction with the statutory definition of net worth, provided an incentive to merge, the ''acquisition method'' would have exactly the opposite effect. The acquiring credit union's net worth ratio not only would not increase as a result of a merger, it probably would decline. The risk of being demoted to a lower PCA net worth category, and in turn being exposed to the mandatory and discretionary supervisory actions of PCA, would naturally discourage interest in mergers, thus limiting their availability to rescue troubled credit unions.

e. *Statutory Expansion of Net Worth Definition.* Concerned that FAS 141(R), in conjunction with the statutory limitation on net worth, would stifle credit union mergers, Congress enacted the Financial Services Regulatory Relief Act, Public Law 109–351, 120 Stat. 1966 (''2006 Relief Act'') in 2006. Section 504 of the 2006 Relief Act expanded the

[1] Since it was first adopted, part 702 has been amended four times. The first amendment incorporated limited technical corrections. 65 FR 55439 (Sept. 14, 2000). The second amendment deleted sections made obsolete by adoption of a uniform quarterly schedule for filing Call Reports. 67 FR 12459 (March 19, 2002). The third amendment incorporated a series of revisions and adjustments to improve and simplify the implementation of PCA. 67 FR 71078 (Nov. 29, 2002). Finally, the fourth amendment added a third risk-weighting tier to the standard risk-based net worth component for member business loans. 68 FR 56537, 56546 (Oct. 1, 2003). A proposal to modify the criteria for filing a net worth restoration plan, 67 FR 7113 (Nov. 29, 2002), was never adopted.

[2] In contrast, for financial reporting purposes, CUMMA requires credit unions to adhere to GAAP in the Call Reports required to be filed with the NCUA Board. 12 U.S.C. 1782(a)(6)(C)(i).

[3] In contrast to NCUA, Congress gave the other federal financial institution regulators the latitude to prescribe the ''relevant capital measures'' of their institutions. 12 U.S.C. 1831o(c)(1). As a result, the ''core capital'' of banks and thrifts is defined to include virtually all GAAP equity components, 12 CFR 325.2(v), whereas credit union capital is limited by law to the ''retained earnings'' component of equity. 12 CFR 702.2(f).

original PCA definition of a natural person credit union's ''net worth'' to include ''any amounts that were previously retained earnings of any other credit union with which [it] has combined.'' 12 U.S.C. 1790d(o)(2)(A) (2006). The express purpose of section 504 is to allow the acquiring credit union ''to follow the new FASB rule while still allowing the capital of both credit unions to flow forward as regulatory capital and thus preserve the incentive for desirable credit union mergers.'' Staff of Senate Comm. on Banking, Housing and Urban Affairs, 109th Cong., *Section-By-Section Analysis of Financial Services Regulatory Relief Act of 2006* (Comm. Print 2006) at 3.[4] To conform to the effective date of FAS 141(R), the modifications to part 702 implementing section 504 must take effect in final form on December 31, 2008, so that they will apply to natural person credit union mergers taking place after that date.

The following table compares the financial reporting and regulatory capital consequences of a credit union merger under present GAAP (pre-FAS 141(R)) and under new GAAP (post-FAS 141(R)) both with and without the proposed modifications to part 702:

POST-MERGER NET WORTH UNDER GAAP WITH AND WITHOUT PROPOSED RULE

	CURRENT GAAP	NEW GAAP WITHOUT PROPOSED RULE	NEW GAAP WITH PROPOSED RULE
GAAP Authority	APB Opinion No. 16	FAS 141 (R)	FAS 141 (R)
GAAP Financial Reporting Method (e.g. Call Report)	"Pooling Method"	"Acquisition Method"	"Acquisition Method"
GAAP Retained Earnings (A) (R/E = Retained Earnings)	Acquiring CU's R/E + Merging CU's R/E	Acquiring CU's R/E	Acquiring CU's R/E
GAAP Total Assets (B) (BkV = Book Value) (FV = Fair Value)	Acquiring CU's Total Assets @ BkV + Merging CU's Total Assets @ BkV	Acquiring CU's Total Assets @ BkV + Merging CU's Total Assets @ FV	Acquiring CU's Total Assets @ BkV + Merging CU's Total Assets @ FV
Net Worth Ratio = Retained Earnings (A) / Total Assets (B)	A / B	A / B	A + Merging CU's R/E / B
Net Worth Ratio = Retained Earnings (B) / Total Assets (A)	$45K / $450K	$ 30K / $ 500K	$30K + $15K / $500K
Post-Merger Net Worth Ratio	10%	6%	9%

2. Corporate Credit Unions

Corporate credit unions are exempt from PCA, 12 U.S.C. 1790d(m), but they are subject to a minimum ''capital ratio'' and to a requirement to calculate their ''retained earnings ratio'' on a monthly basis, both as provided by regulation.

a. *Minimum Capital Ratio.* A corporate credit union's ''capital ratio'' is defined as its capital (numerator) divided by its ''moving daily average net assets'' (denominator). 12 CFR 704.2. Its ''capital'' consists of the sum of its retained earnings, paid-in capital, and membership capital. *Id.* Of these, retained earnings and paid-in capital constitute ''core capital.'' *Id.* A corporate credit union is required to maintain a minimum capital ratio of four percent (4%) calculated at least monthly. 12 CFR 704.3(d). When its capital ratio falls and remains below that minimum, the corporate credit union is subject to remedies that resemble some of the mandatory and discretionary supervisory actions of PCA (*e.g.*, ''capital restoration plan,'' earnings retention requirement, and ''capital directives''). 12 CFR 704.2(g), (h) and (i).

b. *Retained Earnings Ratio.* A corporate credit union's ''retained earnings ratio'' is defined as its retained earnings divided by its moving daily average net assets. 12 CFR 704.2. A corporate credit union is required to

[4] Available at: *http://banking.senate.gov/public/_files/RegRel_summary.pdf.*

calculate its ''retained earnings ratio'' on a monthly basis. 12 CFR 704.3(i). If the retained earnings ratio is less than 2 percent, the credit union becomes subject to an earnings retention requirement. *Id.*

3. Issues for Comment

NCUA welcomes public comment on this proposed rule. To facilitate consideration of the public's views, we ask commenters to organize and identify their comments by credit union type (natural person or corporate) or regulation (part 702 or part 704) and by corresponding topic or definition. General comments, if any, should be included in a separately identified section. Please recognize that NCUA does not establish GAAP, does not oversee FASB, does not have the power to reinstate the ''pooling method,'' and does not have the authority to override or expand limitations and definitions prescribed by law. Therefore, this rulemaking will not address comments advocating any of these actions.

B. Discussion of Proposed Modifications

1. Part 702—Natural Person Credit Union's Post-Merger Net Worth

The 2006 Relief Act's redefinition of ''net worth'' for natural person credit unions is implemented through Part 702's PCA definitions. The present definition of ''net worth,'' 12 CFR 702.2(f), is reorganized into subsections and includes the following new subsection:

(3) For a credit union that acquires another credit union in a mutual combination, net worth also includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition. A mutual combination is a transaction in which a credit union acquires either another credit union, or an integrated set of activities and assets that is capable of being conducted and managed as a credit union for the purpose of providing a return in the form of economic benefits directly to owner members.

In the first sentence, proposed subsection (3) adds to an acquiring credit union's net worth an amount equal to the merging credit union's retained earnings balance at the point it was acquired, yielding a regulatory capital measure that approximates the net worth previously obtainable under the ''pooling method.'' [5]

Proposed subsection (3) is not limited in scope to the acquisition by merger of a credit union as an intact legal entity. FAS 141(R) at ¶3d. The definition of ''mutual combination'' in the second sentence incorporates the GAAP definition of a ''business'' and a ''business combination.'' FAS 141(R) at ¶¶3d–e. This allows subsection (3) to apply to transactions (e.g., certain purchase and assumptions) that convey substantially all of the components of a credit union, even though the components together no longer legally constitute a credit union.

The net effect of the modifications to part 702 is to apply FAS 141(R) to natural person credit union mergers for financial reporting purposes, while for PCA purposes replicating the post-merger net worth that would have resulted under the ''pooling method.'' These modifications affect only the measurement of a credit union's post-merger regulatory capital under PCA; financial reporting in its Call Report still must adhere to GAAP (i.e., acquirer's retained earnings balance must be reported consistent with GAAP). 12 U.S.C. 1782(a)(6)(C)(i).

2. Part 704—Corporate Credit Union's Post-Merger Capital

The proposed rule modifies part 704 [Corporate Credit Unions] to expand the definitions associated with corporate credit union capital to correspond with the statutory expansion of net worth for natural person credit unions. As such, the definition of the ''capital'' and ''core capital'' of a corporate credit union that acquires another credit union by merger is modified to include ''the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.'' The same modification is made to the definition of a corporate credit union's ''retained earnings ratio.'' Further, to encompass not only the acquisition of a credit union as an intact legal entity, but also as a group of credit union components that together are no longer legally constituted as such, the proposed rule adds a separate definition of ''mutual combination'' that, like proposed section 702.2(f)(3), incorporates the GAAP definition of ''business'' and ''business combination.''

The NCUA Board has greater flexibility to define corporate credit union capital than the 2006 Relief Act allows for the net worth of natural person credit unions. 12 U.S.C. 1766(a). Therefore, to more closely approximate the regulatory capital result of the ''pooling method,'' identifiable and unidentifiable intangibles are excluded from the definition of a corporate credit union's ''moving daily average net assets'' (''MDANA'')—the denominator of the capital ratio. Identifiable intangibles could include existing member relationships (i.e., core deposit intangibles) and unserved portions of a field of membership; unidentifiable intangibles include predominantly goodwill. The purpose of excluding intangibles from the MDANA denominator of the capital ratio is to approximate the denominator of the capital ratio under the ''pooling method.'' That denominator did not reflect the merging credit union's intangibles, nor the increased valuation of its tangible assets. This approach resembles the approach followed by other Federal banking regulators.

Even though the statutory definition of net worth does not permit natural person credit unions to exclude intangibles, allowing corporate credit unions to do so approximates for regulatory capital purposes the result that would have been achieved under the ''pooling method.'' The Board welcomes public comment on whether this approach adequately addresses the risk of devaluation and possible loss to the National Credit Union Share Insurance Fund.

The net effect of the modifications to part 704 is to apply FAS 141(R) to financial reporting of corporate credit union mergers while replicating the post-merger capital, capital ratio and retained earnings that would have resulted under the ''pooling method.'' These modifications to part 704 must take effect in final form on December 31, 2008, to parallel the effective date of the modifications to part 702 that implement the expanded definition of ''net worth.''

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis describing any significant economic impact a proposed regulation may have on a substantial number of small credit unions (primarily those under $10 million in assets). The proposed rule implements an Act of Congress expanding the definition of a natural person credit union's net worth. 12 U.S.C. 1790d(o)(2)(A) (2006). The rule affects the calculation of the post-merger net worth of an acquiring credit union, the vast majority of which exceed $10 million in assets. Accordingly, the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small credit unions. The NCUA Board invites comment on this issue.

[5] The result approximates, but does not duplicate, that of the ''pooling method'' because CUMAA does not authorize a corresponding exclusion of intangibles from the ''total assets'' denominator of the net worth ratio.

Paperwork Reduction Act

NCUA has determined that the proposed rule would not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget. Control number 3133–0154 has been issued for part 702 and control number 3133–0129 has been issued for part 704. Both will be displayed in the table at 12 CFR part 795.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on State and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily adheres to the fundamental federalism principles addressed by the executive order. This proposed rule would apply to all federally-insured credit unions, including State-chartered credit unions, and thus may raise some federalism implications. However, the proposal is unlikely to have a direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government because it facilitates, rather than diminishes, the ability of state-chartered credit unions to combine with other credit unions.

Treasury and General Government Appropriations Act, 1999

NCUA has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Parts 702 and 704

Credit unions, Reporting and recordkeeping requirements, Surety bonds.

By the National Credit Union Administration Board on July 24, 2008.

Mary Rupp,

Secretary of the Board.

For the reasons set forth above, NCUA proposes to amend 12 CFR parts 702 and 704 as follows:

PART 702—PROMPT CORRECTIVE ACTION

1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

2. Amend § 702.2 by revising paragraph (f) to read as follows:

§ 702.2 Definitions.

* * * * *

(f) *Net Worth* means—

(1) The retained earnings balance of the credit union at quarter-end as determined under generally accepted accounting principles, subject to paragraph (f)(3) of this section. Retained earnings consists of undivided earnings, regular reserves, and any other appropriations designated by management or regulatory authorities;

(2) For a low income-designated credit union, net worth also includes secondary capital accounts that are uninsured and subordinate to all other claims, including claims of creditors, shareholders and the NCUSIF; and

(3) For a credit union that acquires another credit union in a mutual combination, net worth includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition. A mutual combination is a transaction in which a credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union for the purpose of providing a return in the form of economic benefits directly to owner members.

* * * * *

PART 704—CORPORATE CREDIT UNIONS

1. The authority citation for part 704 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1781, 1789.

2. Amend § 704.2 by:

a. Revising the current definitions of *Capital*, *Core capital*, *Moving daily average net assets* and *Retained earnings ratio* to read as set forth below; and

b. Adding the definition of *Mutual combination* following the revised definition of *Moving daily average net assets*, to read as follows:

§ 704.2 Definitions.

* * * * *

Capital means the sum of a corporate credit union's retained earnings, paid-in capital, and membership capital. For a corporate credit union that acquires another credit union in a mutual combination, capital includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

Core capital means the sum of a corporate credit union's retained earnings, and paid-in capital. For a corporate credit union that acquires another credit union in a mutual combination, core capital includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

Moving daily average net assets means the average of daily average net assets exclusive of identifiable and unidentifiable intangibles for the month being measured and the previous eleven (11) months.

Mutual combination means a transaction or event in which a corporate credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union for the purpose of providing a return in the form of economic benefits directly to owner members.

* * * * *

Retained earnings ratio means the corporate credit union's retained earnings divided by its moving daily average net assets. For a corporate credit union that acquires another credit union in a mutual combination, the numerator of the retained earnings ratio also includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

[FR Doc. E8–17415 Filed 7–29–08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2007–28391; Airspace Docket No. 07–AAL–10]

RIN 2120–AA66

Proposed Modification of the Norton Sound Low, Woody Island Low, Control 1234L and Control 1487L Offshore Airspace Areas; AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Norton Sound Low, Woody Island Low, Control 1234L, and Control 1487L Offshore Airspace Areas in Alaska. This action would modify these areas by lowering the airspace floors to provide additional controlled airspace for aircraft instrument flight rule (IFR) operations at Alaska airports.

DATES: Comments must be received on or before September 15, 2008.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify the docket number FAA–2007–28391 and Airspace Docket No. 07–AAL–10, at the beginning of your comments. You may also submit comments on the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2007–28391 and Airspace Docket No. 07–AAL–10) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2007–28391 and Airspace Docket No. 07–AAL–10.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the **Federal Register**'s Web page at *http://www.gpoaccess.gov/fr/index.html*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, Alaska Flight Service Operations, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to modify the Norton Sound Low, Woody Island Low, Control 1234L and Control 1487L Offshore Airspace Areas in Alaska.

The Norton Sound Low Offshore Airspace Area would be modified by lowering the offshore airspace floor to 1,200 feet mean sea level (MSL) at the following airports: Within 78 miles of Buckland; within 73 miles of Chevak; within 74 miles of Kotzebue; within 73 miles of Noatak; within 74 miles of Selawik; and within 73 miles of Port Heiden. Also, the Norton Sound Low Offshore Airspace area would be lowered to 700 feet MSL at Port Heiden Airport.

The Woody Island Low Offshore Airspace Area would be modified in the vicinity of the Kodiak, Middleton Island and Port Heiden Airports by lowering the offshore airspace floor to 1,200 feet MSL within 73 miles of Kodiak and Port Heiden Airports, and within 42 miles of the Middleton Island Airport.

Additionally, the Control 1234L Offshore Airspace area would be modified by lowering the offshore airspace floor to 700 feet above the surface within 6.3 miles, and 1,200 feet above the surface within 45 miles, of Nikolski Airport; and within 1,200 feet above the surface within 73 miles of Port Heiden Airport.

Finally, this action would modify the Control 1487L Offshore Airspace Area by lowering the offshore airspace floor to 1,200 feet MSL within 73 miles of Kodiak Airport, and corrects an error in one coordinate adjoining the Woody Island Low Control Area. This correction will align the adjoining airspaces.

Offshore airspace areas are published in paragraph 6007 of FAA Order 7400.9R, signed August 15, 2007, and effective September 15, 2007, which is incorporated by reference in 14 CFR 71.1. The offshore airspace areas listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies offshore airspace areas in Alaska.

ICAO Considerations

As part of this proposal relates to navigable airspace outside the United States, this notice is submitted in accordance with the International Civil

Aviation Organization (ICAO) International Standards and Recommended Practices.

The application of International Standards and Recommended Practices by the FAA, Office of System Operations Airspace and AIM, Airspace & Rules, in areas outside the United States domestic airspace, is governed by the Convention on International Civil Aviation. Specifically, the FAA is governed by Article 12 and Annex 11, which pertain to the establishment of necessary air navigational facilities and services to promote the safe, orderly, and expeditious flow of civil air traffic. The purpose of Article 12 and Annex 11 is to ensure that civil aircraft operations on international air routes are performed under uniform conditions.

The International Standards and Recommended Practices in Annex 11 apply to airspace under the jurisdiction of a contracting state, derived from ICAO. Annex 11 provisions apply when air traffic services are provided and a contracting state accepts the responsibility of providing air traffic services over high seas or in airspace of undetermined sovereignty. A contracting state accepting this responsibility may apply the International Standards and Recommended Practices that are consistent with standards and practices utilized in its domestic jurisdiction.

In accordance with Article 3 of the Convention, state-owned aircraft are exempt from the Standards and Recommended Practices of Annex 11. The United States is a contracting state to the Convention. Article 3(d) of the Convention provides that participating state aircraft will be operated in international airspace with due regard for the safety of civil aircraft. Since this action involves, in part, the designation of navigable airspace outside the United States, the Administrator is consulting with the Secretary of State and the Secretary of Defense in accordance with the provisions of Executive Order 10854.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9R, Airspace Designations and Reporting Points, signed August 15, 2007, and effective September 15, 2007, is amended as follows:

Paragraph 6007 Offshore Airspace Areas.

* * * * *

Norton Sound Low, AK [Amended]

That airspace extending upward from 14,500 feet MSL within an area bounded by a line beginning at lat. 56°42′59″ N., long. 160°00′00″ W., north by a line 12 miles from and parallel to the U.S. coastline to the intersection with 164°00′00″ W., longitude near the outlet to Kotzebue Sound, then north to the intersection with a point 12 miles from the U.S. coastline, then north by a line 12 miles from and parallel to the shoreline to lat. 68°00′00″ N., to lat. 68°00′00″ N., long. 168°58′23″ W., to lat. 65°00′00″ N., long. 168°58′23″ W., to lat. 62°35′00″ N., long. 175°00′00″ W., to lat. 59°59′57″ N., long. 168°00′08″ W., to lat. 57°45′57″ N., long. 161°46′08″ W., to lat. 58°06′57″ N., long. 160°00′00″ W., to the point of beginning; and that airspace extending upward from 1,200 feet MSL north of the Alaska Peninsula and east of 160° W. longitude within 73 miles of the Port Heiden NDB/DME, AK, and north of the Alaska Peninsula and east of 160° W. longitude within an 81.2-mile radius of Perryville Airport, AK, and north of the Alaska Peninsula and east of 160° W. longitude within a 72.8-mile radius of Chignik Airport, AK, and within a 35-mile radius of lat. 60°21′17″ N., long. 165°04′01″ W., and within a 73-mile radius of the Chevak Airport, AK, and within a 74-mile radius of the Selawik Airport, AK, and within a 45-mile radius of Hooper Bay Airport, AK, and within a 73-mile radius of St. Michael Airport, AK, and within a 77.4-mile radius of the Nome VORTAC, AK, and within a 30-mile radius of lat. 66°09′58″ N., long. 166°30′03″ W., and within a 30-mile radius of lat. 66°19′55″ N., long. 165°40′32″ W., and within a 74-mile radius of the Kotzebue VOR/DME, AK, and within a 73-mile radius of the Noatak Airport, AK; and within a 71NM radius of New Stuyahok Airport, AK; and that airspace extending upward from 700 feet MSL within 8 miles west and 4 miles east of the 339° bearing from the Port Heiden NDB/DME, AK, extending from the Port Heiden NDB/DME, AK, to 20 miles north of the Port Heiden NDB/DME, AK, and within a 25-mile radius of Nome Airport, AK.

* * * * *

Woody Island Low, AK [Amended]

That airspace extending upward from 14,500 feet MSL within the area bounded by a line beginning at lat. 53°30′00″ N., long. 160°00′00″ W., to lat. 56°00′00″ N., long. 153°00′00″ W., to lat. 56°45′42″ N., long. 151°45′00″ W., to lat. 58°19′58″ N., long. 148°55′07″ W., to lat. 59°08′34″ N., long. 147°16′06″ W., then clockwise via the 149.5-mile radius from the Anchorage, VOR/DME, AK, to the intersection with a point 12 miles from and parallel to the U.S. coastline, then southwest by a line 12 miles from and parallel to the U.S. coastline to the intersection with 160°00′00″ W. longitude, to the point of beginning; and that airspace extending upward from 1,200 feet MSL, within 73 miles of the Kodiak Airport, AK, and that airspace extending south and east of the Alaska Peninsula within a 72.8-mile radius of Chignik Airport, AK, and outside (south) of the 149.5-mile radius of the Anchorage VOR/DME, AK, within a 73-mile radius of Homer Airport, AK, and within a 42-mile radius of the Middleton Island VOR/DME, AK, and south and east of the Alaska Peninsula within an 81.2-mile radius of Perryville Airport, AK, and south of the Alaska Peninsula within a 73-mile radius of the Port Heiden NDB/DME, AK.

* * * * *

Control 1234L [Amended]

That airspace extending upward from 2,000 feet above the surface within an area bounded by a line beginning at lat. 58°06′57″ N., long. 160°00′00″ W., then south along 160°00′00″ W. longitude, until it intersects the Anchorage Air Route Traffic Control Center (ARTCC) boundary; then southwest, northwest, north, and northeast along the Anchorage ARTCC boundary to lat. 62°35′00″ N., long. 175°00′00″ W., to lat. 59°59′57″ N., long. 168°00′08″ W., to lat. 57°45′57″ N., long. 161°46′08″ W., to the point of beginning; and that airspace extending upward from 1,200 feet above the surface within a 26.2-mile radius of Eareckson Air Station, AK, within an 11-mile radius of Adak Airport, AK, and within 16 miles of Adak Airport, AK, extending clockwise from the 033° bearing to the 081° bearing from the Mount Moffett NDB, AK, and within a 10-mile radius of Atka Airport, AK, and within a 10.6-mile radius from Cold Bay Airport, AK, and within 9 miles east and 4.3 miles west of the 321° bearing from Cold Bay Airport, AK, extending from the 10.6-mile radius to 20 miles northwest of Cold Bay Airport, AK, and 4 miles each side of the 070° bearing from Cold Bay Airport, AK, extending from the 10.6-mile radius to 13.6 miles northeast of Cold Bay Airport, AK, and within a 26.2-mile radius of Eareckson Air Station, AK, and west of 160° W. longitude within an 81.2-mile radius of Perryville Airport, AK, and within a 45-mile radius of the Nikolski Airport, AK, and west of 160° W. longitude within a 73-mile radius of the Port Heiden NDB/DME, AK, and within a 10-mile radius of St. George Airport, AK, and within a 73-mile radius of St. Paul Island Airport, AK, and within a 20-mile radius of Unalaska Airport, AK, extending clockwise from the 305° bearing from the Dutch Harbor NDB, AK, to the 075° bearing from the Dutch

Harbor NDB, AK, and west of 160° W. longitude within a 25-mile radius of the Borland NDB/DME, AK, and west of 160° W. longitude within a 72.8-mile radius of Chignik Airport, AK; and that airspace extending upward from 700 feet above the surface within a 6.9-mile radius of Eareckson Air Station, AK, and within a 7-mile radius of Adak Airport, AK, and within 5.2 miles northwest and 4.2 miles southeast of the 061° bearing from the Mount Moffett NDB, AK, extending from the 7-mile radius of Adak Airport, AK, to 11.5 miles northeast of Adak Airport, AK and within a 6.5-mile radius of King Cove Airport, and extending 1.2 miles either side of the 103° bearing from King Cove Airport from the 6.5-mile radius out to 8.8 miles, and within a 6.4-mile radius of the Atka Airport, AK, and within a 6.3-mile radius of Nelson Lagoon Airport, AK, and within a 6.3-mile radius of the Nikolski Airport, AK, and within a 6.4-mile radius of Sand Point Airport, AK, and within 3 miles each side of the 172° bearing from the Borland NDB/DME, AK, extending from the 6.4-mile radius of Sand Point Airport, AK, to 13.9 miles south of Sand Point Airport, AK, and within 5 miles either side of the 318° bearing from the Borland NDB/DME, AK, extending from the 6.4-mile radius of Sand Point Airport, AK, to 17 miles northwest of Sand Point Airport, AK, and within 5 miles either side of the 324° bearing from the Borland NDB/DME, AK, extending from the 6.4-mail radius of Sand Point Airport, AK, to 17 miles northwest of the Sand Point Airport, AK, and within a 6.6-mile radius of St. George Airport, AK, and within an 8-mile radius of St. Paul Island Airport, AK, and 8 miles west and 6 miles east of the 360° bearing from St. Paul Island Airport, AK, to 14 miles north of St. Paul Island Airport, AK, and within 6 miles west and 8 miles east of the 172° bearing from St. Paul Island Airport, AK, to 15 miles south of St. Paul Island Airport, AK, and within a 6.4-mile radius of Unalaska Airport, AK, and within 2.9 miles each side of the 360° bearing from the Dutch Harbor NDB, AK, extending from the 6.4-mile radius of Unalaska Airport, AK, to 9.5 miles north of Unalaska Airport, AK; and that airspace extending upward from the surface within a 4.6-mile radius of Cold Bay Airport, AK, and within 1.7 miles each side of the 150° bearing from Cold Bay Airport, AK, extending from the 4.6-mile radius to 7.7 miles southeast of Cold Bay Airport, AK, and within 3 miles west and 4 miles east of the 335° bearing from Cold Bay Airport, AK, extending from the 4.6-mile radius to 12.2 miles northwest of Cold Bay Airport, AK.

* * * * *

Control 1487L [Amended]

That airspace extending upward from 8,000 feet MSL within 149.5 miles of the Anchorage VOR/DME clockwise from the 090° radial to the 185° radial of the Anchorage VOR/DME, AK; and that airspace extending upward from 5,500 feet MSL within the area bounded by a line beginning at lat. 58°19′58″ N., long. 148°55′07″ W.; to lat. 59°08′34″ N., long. 147°16′06″ W.; thence counterclockwise via the 149.5-mile radius of the Anchorage VOR/DME, AK, to the intersection with a point 12 miles from and parallel to the U.S. coastline; thence southeast 12 miles from and parallel to the U.S. coastline to a point 12 miles offshore on the Vancouver FIR boundary; to lat. 54°32′57″ N., long. 133°11′29″ W.; to lat. 54°00′00″ N., long. 136°00′00″ W.; to lat. 52°43′00″ N., long. 135°00′00″ W.; to lat. 56°45′42″ N., long. 151°45′00″ W.; to the point of beginning; and that airspace extending upward from 1,200 feet MSL within the area bounded by a line beginning at lat. 59°33′25″ N., long. 141°03′22″ W.; thence southeast 12 miles from and parallel to the U.S. coastline to lat. 58°56′18″ N., long. 138°45′19″ W.; to lat. 58°40′00″ N., long. 139°30′00″ W.; to lat. 59°00′00″ N., long. 141°10′00″ W.; to the point of beginning, and within an 85-mile radius of the Biorka Island VORTAC, AK, and within a 42-mile radius of the Middleton Island VOR/DME, AK, and within a 30-mile radius of the Glacier River NDB, AK, and within a 149.5-mile radius of the Anchorage VOR/DME, AK, and within a 73-mile radius of Homer Airport, AK, and within a 73-mile radius of the Kodiak Airport, AK; and that airspace extending upward from 700 feet MSL within 14 miles of the Biorka Island VORTAC, AK, and within 4 miles west and 8 miles east of the Biorka Island VORTAC 209° radial extending to 16 miles southwest of the Biorka Island VORTAC, AK.

* * * * *

Issued in Washington, DC, on July 22, 2008.

Stephen L. Rohring,

Acting Manager, Airspace and Rules Group.

[FR Doc. E8–17384 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0502; FRL–8699–3]

Revisions to the California State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (NO_X) emissions from gaseous- and liquid-fueled internal combustion engines. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by *August 29, 2008*.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2008–0502, by one of the following methods:

1. *Federal eRulemaking Portal*: *www.regulations.gov*. Follow the on-line instructions.
2. *E-mail*: *steckel.andrew@epa.gov*.
3. *Mail or deliver*: Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or e-mail. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Francisco Dóñez, EPA Region IX, (415) 972–3956, *Donez.Francisco@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

III. Statutory and Executive Order Reviews

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board.

TABLE 1—SUBMITTED RULE

Local agency	Rule #	Rule title	Adopted	Submitted
SCAQMD	1110.2	Gaseous- and Liquid-Fueled Internal Combustion Engines ..	02/01/08	05/20/08

On June 9, 2008, this rule submittal was found to meet the completeness criteria in 40 CFR Part 51, Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

There are no previous versions of Rule 1110.2 in the SIP, although the SCAQMD adopted earlier versions of this rule on September 7, 1990; August 12, 1994; and December 9, 1994. Those versions were not submitted to EPA. The SCAQMD adopted an additional version of Rule 1110.2 on November 14, 1997, and CARB submitted that version to us on May 18, 1998. We proposed a limited approval and limited disapproval of that submission on March 18, 1999 (64 FR 13372), but did not finalize that action. While we can act on only the most recently submitted version, we have reviewed materials provided with previous submittals.

C. What is the purpose of the submitted rule?

NO_X helps produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control NO_X emissions. Rule 1110.2 regulates NO_X emissions, as well as volatile organic compound (VOC) and carbon monoxide (CO) emissions, from stationary and portable internal combustion engines rated at 50 or more horsepower, including agricultural engines. EPA's technical support document (TSD) has more information about this rule.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rule?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each major source in nonattainment areas (see sections 182(a)(2) and 182(f)), and must not relax existing requirements (see sections 110(l) and 193). The SCAQMD regulates an ozone nonattainment area (see 40 CFR part 81), so Rule 1110.2 must fulfill RACT. Additionally, SIP rules must require Best Available Control Measures (BACM), including Best Available Control Technology (BACT), in serious particulate matter (PM) nonattainment areas (see CAA sections 189(a)(1) and 189(b)(1)). The SCAQMD regulates a PM nonattainment area classified as serious (see 40 CFR part 81), so Rule 1110.2 must implement BACM for PM precursors, including NO_X.

Guidance and policy documents that we use to help consistently evaluate enforceability and RACT or BACM requirements include the following:

1. ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' (the NO_X Supplement), 57 FR 55620, November 25, 1992.

2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).

3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).

4. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).

5. ''State Implementation Plans for Serious PM–10 Nonattainment Areas, and Attainment Date Waivers for PM–10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 59 FR 41998 (August 16, 1994).

6. ''PM–10 Guideline Document,'' EPA 452/R–93–008, April 1993.

7.''Determination of Reasonably Available Control Technology and Best Available Retrofit Control Technology for Stationary Spark-Ignited Internal Combustion Engines'' (''the Determination''), California Air Resources Board (November 2001).

8. ''Best Available Control Technology Guidelines,'' South Coast Air Quality Management District (August 17, 2000; latest revision July 14, 2006).

B. Does the rule meet the evaluation criteria?

We believe this rule is consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. The rule's emissions limits are more stringent than the corresponding limits in the Determination or other California District rules on internal combustion engines. The emissions limits taking effect in 2011 and 2012 are comparable to the limits expressed by the South Coast AQMD BACT Guidelines. The deficiencies cited in the technical support document (TSD) for the November 14, 1997 version of Rule 1110.2 (TSD dated January 27, 2005), have been adequately remedied or justified in this version. The TSD has more information on our evaluation.

C. EPA Recommendations To Further Improve the Rule

At this time, EPA does not have recommendations to further improve this rule.

D. Public Comment and Final Action

Because EPA believes the submitted rule fulfills all relevant requirements, we are proposing to fully approve it as described in section 110(k)(3) of the Act. We will accept comments from the public on this proposal for the next 30 days. Unless we receive convincing new information during the comment period, we intend to publish a final approval action that will incorporate this rule into the federally enforceable SIP.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 11, 2008.

Laura Yoshii,

Acting Regional Administrator,Region IX.

[FR Doc. E8–17455 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1495; MB Docket No. 08–113; RM–11446]

Television Broadcasting Services; Glendive, MT

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a channel substitution proposed by Glendive Broadcasting Corp. (''Glendive''), the permittee of KXGN–DT, DTV channel 10, Glendive, Montana. Glendive requests the substitution of DTV channel 5 for channel 10 at Glendive.

DATES: Comments must be filed on or before August 29, 2008, and reply comments on or before September 15, 2008.

ADDRESSES: Federal Communications Commission, Office of the Secretary 445 12th Street, SW., TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: David D. Oxford, Esq., Davis Wright Tremaine LLP, 1919 Pennsylvania Avenue, NW., Suite 200, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, *joyce.bernstein@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–113, adopted July 17, 2008, and released July 22, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC, 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the DTV Table of Allotments under Montana, is amended by adding channel 5 and removing channel 10 at Glendive.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E8–17448 Filed 7–29–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1705; MB Docket No. 08–147; RM–11473]

Television Broadcasting Services; Stuart, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a channel substitution proposed by Guenter Marksteiner, the permittee of station WHDT–DT, post-transition DTV channel 44, Stuart, Florida. Mr. Marksteiner requests the substitution of DTV channel 42 for channel 44 at Stuart.

DATES: Comments must be filed on or before August 29, 2008, and reply comments on or before September 15, 2008.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Lauren Lynch Flick, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, NW., Washington, DC 20037–1128.

FOR FURTHER INFORMATION CONTACT: David Brown, *david.brown@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–147, adopted July 17, 2008, and released July 22, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the DTV Table of Allotments under Florida, is amended by adding channel 42 and removing channel 44 at Stuart.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E8–17443 Filed 7–29–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1704; MB Docket No. 08–148; RM–11474]

Television Broadcasting Services; Fort Worth, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a channel substitution proposed by Television Station KTXA L.P. ("KTXA"), the licensee of KTXA–DT, DTV channel 18, Fort Worth, Texas. KTXA requests the substitution of DTV channel 19 for channel 18 at Fort Worth.

DATES: Comments must be filed on or before August 29, 2008, and reply comments on or before September 15, 2008.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Howard F. Jaeckel, Esq., 51 W. 52nd Street, New York, New York 10019.

FOR FURTHER INFORMATION CONTACT: David Brown, *david.brown@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–148, adopted July 17, 2008, and released July 22, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the DTV Table of Allotments under Texas, is amended by adding channel 19 and removing channel 18 at Fort Worth.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E8–17444 Filed 7–29–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1703; MB Docket No. 08–149; RM–11475]

Television Broadcasting Services; Columbus, GA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a channel substitution proposed by Georgia Public Telecommunications (''GPTC''), the permittee of noncommercial educational station WJSP–DT, DTV channel *23, Columbus, Georgia. GPTC requests the substitution of DTV channel *11 for channel *23 at Columbus.

DATES: Comments must be filed on or before August 29, 2008, and reply comments on or before September 15, 2008.

ADDRESSES: Federal Communications Commission, Office of the Secretary 445 12th Street, SW., TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Theodore D. Frank. Esq., Arnold & Porter LLP, 555 Twelfth Street, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, *joyce.bernstein@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–149, adopted July 17, 2008, and released July 22, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC, 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the DTV Table of Allotments under Georgia, is amended by adding channel *11 and removing channel *23 at Columbus.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E8–17445 Filed 7–29–08; 8:45 am]

BILLING CODE 6712–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 525 and 552

[GSAR Case 2006–G520; Docket 2008–0007; Sequence 15]

RIN 3090–AI66

General Services Acquisition Regulation; GSAR Case 2006–G520; Rewrite of GSAR Part 525, Foreign Acquisition

AGENCY: Office of the Chief Acquisition Officer, General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: The General Services Administration (GSA) is proposing to amend the General Services Acquisition Regulation (GSAR) to update the text addressing foreign acquisition. This rule is a result of the General Services Administration Acquisition Manual (GSAM) Rewrite initiative undertaken by GSA to revise the GSAM to maintain consistency with the FAR, and to implement streamlined and innovative acquisition procedures that contractors, offerors and GSA contracting personnel can utilize when entering into and administering contractual relationships. The GSAM incorporates the General Services Administration Acquisition Regulation (GSAR) as well as internal agency acquisition policy. GSA will

rewrite each part of the GSAR and GSAM, and as each part is rewritten, will publish it in the **Federal Register**.

This part is a continuance in a series of revisions. It covers the rewrite of GSAR Part 525, Foreign Acquisition.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before September 29, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2006–G520 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov*.

Submit comments via the Federal eRulemaking portal by inputting ''GSAR Case 2006–G520'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with GSAR Case 2006–G520. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''GSAR Case 2006–G520'' on your attached document.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2006–G520 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT For clarification of content, contact Ms. Meredith Murphy at (202) 208–6925. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2006–G520.

SUPPLEMENTARY INFORMATION:

A. Background

The GSAR Rewrite Project

GSA published an Advance Notice of Proposed Rulemaking (ANPR) in the **Federal Register** at 71 FR 7910, February 15, 2006, with request for comments because GSA was beginning the review and update of the General Services Administration Acquisition Regulation (GSAR).

This GSAR rewrite has—

- Considered comments received from the ANPR, published February 15, 2006.
- Changed ''you'' to ''contracting officer.''
- Maintained consistency with the FAR, but eliminated duplication.
- Revised GSAR sections that are out of date, or which imposed inappropriate burdens on the Government or contractors, especially small businesses.
- Streamlined and simplified wherever possible.

In addition, GSA has recently reorganized into two (2), rather than three (3), services. Therefore, the reorganization of the Federal Supply Service (FSS) and the Federal Technology Service (FTS) into the Federal Acquisition Service (FAS) was considered in the rewrite initiative.

The Rewrite of Part 525

Subpart 525.3, Balance of Payment Programs, is proposed for deletion because FAR Case 99–616, dated November 20, 2006, removed the corresponding FAR coverage. Subpart 525.5, Evaluating Foreign Offers—Supply Contracts, and the related clause at 552.225–70, are proposed for deletion because they were replaced on January 25, 2007, by GSA Acquisition Letter V–07–02 with more current Berry Amendment coverage at Subpart 525.10, Additional Foreign Acquisition Regulations. Subpart 525.6, Trade Sanctions, is proposed for deletion because Federal Acquisition Circular 2005–09, dated April 2006, removed the corresponding FAR coverage. Subpart 552.3, Provision and Clause Matrices, is being revised to delete reference to the clause at 552.225–70 from the Matrix.

Discussion of Comments

As a result of the ANPR, GSA received three comments pertaining to GSAR Part 525.

Comment 1: One commenter suggested revising the GSAR to provide an exception to the Trade Agreements Act (and certain other domestic source requirements) for commercial off-the-shelf items.

Response: The language of the statute does not authorize such exceptions to be made at the agency level.

Comment 2: The second commenter stressed that, in the medical world, there are numerous products that either are already manufactured off-shore in non-designated countries or soon will be according to industry via market research. When these types of medical items begin to be produced off-shore, historically all competitors end up moving production shortly thereafter because of pricing pressures, and none of them or any future competitors initiate production in an acceptable country under the T.A.A. With this in mind, it is felt that exemptions to the T.A.A. via a non-availability determination should be allowed. The contracting officer making the non-availability determination (with approval from the appropriate individual) can continually monitor the availability of FedBizOpps sources sought announcements, SBA Pro-Net searches and possible other methods.

Response: The statute authorizes a head of the contracting activity to make a non-availability determination on an individual item basis, and this authority is specifically addressed at 525.103(d). The procedure for requesting that an item be added to the List of Nonavailable Articles is at FAR 25.104.

Comment 3: The third commenter suggests that GSA consider revising the GSAR to implement supplemental guidance to clarify the application of the Buy American Act (''BAA''), 41 U.S.C. 10a–10d and Executive order 10582, December 17, 1954, and the Trade Agreements Act (''TAA''), 19 U.S.C. 2501 *et seq.*, to FSS and GWAC Contracts. Contractors seek consistency in treatment under the law and applicable regulations. Knowing when the BAA and TAA apply and how their respective tests will be applied to products and services is of great importance to contractors. Contractors selling commercial items to the Federal Government generally do not manufacture their products based on the origin of supplies or manufacturing locations. The Government, however, requires such contractors to consider these things when they contract to sell commercial products to the Federal Government. Making it easier for contractors to know and understand how the rules will be applied can only improve the procurement system. This is particularly important because an inaccurate certification can result in loss of monies, contracts, serious civil and criminal penalties, or both. Currently there is uncertainty as to whether the BAA or TAA applies to a procurement. The TAA dollar value applicability threshold, which is set out in FAR 25.402, can vary according to whether the country of origin is a Free Trade Agreement (''FTA'') country and whether the contract is for supplies, services or construction.

The commenter also stated that applicability of the Berry Amendment to orders placed under Schedule contracts was not clear.

Response: The statute specifically makes the law (TAA or BAA) applicable to the total value of the acquisition, which the GSA Office of General Counsel has interpreted as meaning the total contract value, not the value of the individual task order. Therefore, the TAA applies to each order issued under the Schedule contract.

GSA issues Schedules for use by many Government agencies. By regulation, restrictions (such as the Berry Amendment) that are not applicable to all agencies are required to be placed in individual task orders to which they do apply, not in the basic Schedule contract.

The commenter correctly states that GSA is not subject to the Berry Amendment. However, the statute is applicable to purchases ''made with DOD appropriated funds,'' without regard to which agency places the order. GSA Acquisition Letter V–07–02, Implementation of Berry Amendment Contracting Requirements for Assisted Acquisitions Using DOD Funds, dated January 25, 2007, requires the contracting officer for individual task orders to review the requirement and source of funds for Berry Amendment applicability and include the appropriate DFARS clause in the resulting procurement. In other words, any task order issued using DoD appropriated funds must include the Berry Amendment.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because there are no substantive changes. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. GSA will consider comments from small entities concerning the affected GSAR Parts 525 and 552 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (GSAR case 2006–G520), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the GSAM do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 525 and 552

Government procurement.

Dated: July 24, 2008.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, GSA proposes to amend 48 CFR parts 525 and 552 as set forth below:

1. The authority citation for 48 CFR parts 525 and 552 is revised to read as follows:

Authority: 40 U.S.C. 121(c).

PART 525—FOREIGN ACQUISITION

Subpart 525.3 [Removed]

2. Subpart 525.3 is removed.

Subpart 525.5 [Removed]

3. Subpart 525.5 is removed.

Subpart 525.11 [Removed]

4. Subpart 525.11 is removed.

PART 552–SOLICITATION PROVISIONS AND CONTRACT CLAUSES

552.225–70 [Removed]

5. Section 552.225–70 is removed.

[FR Doc. E8–17373 Filed 7–29–08; 8:45 am]

BILLING CODE 6820–61–S

Notices

Federal Register

Vol. 73, No. 147

Wednesday, July 30, 2008

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Notice of the Specialty Crop Committee's Stakeholder Listening Sessions

AGENCY: Research, Education, and Economics, USDA.

ACTION: Notice of stakeholder listening sessions.

SUMMARY: In accordance with the Federal Advisory Committee Act, 5 U.S.C. App 2, the United States Department of Agriculture announces three stakeholder listening sessions of the Specialty Crop Committee, under the auspices of the National Agricultural Research, Extension, Education, and Economics Advisory Board.

DATES: The Specialty Crop Committee will hold three stakeholder listening sessions August 20, 2008 from 1 p.m.–4:30 p.m., August 21, 2008 from 9 a.m.–1 p.m. and on September 4, 2008 from 9 a.m.–3 p.m.

ADDRESSES: The stakeholder listening sessions of the Specialty Crop Committee will take place on August 20, 2008, at the Cotton Tree Inn, 2300 Market Street, Mt. Vernon, Washington 98273; August 21, 2008 at the Ellensburg Quality Inn, 1700 Canyon Road, Ellensburg, WA 98926; and September 4, 2008 at The Inn on the Lake, 770 South Main Street, Canandaigua, NY 14424.

The public may file written comments before or up to two weeks after the listening session with the contact person identified in this notice at: The National Agricultural Research, Extension, Education, and Economics Advisory Board Office, U.S. Department of Agriculture, Room 344–A, Jamie L. Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250–2255.

FOR FURTHER INFORMATION CONTACT: Karen Hunter, Executive Director, National Agricultural Research, Extension, Education, and Economics Advisory Board; telephone: (202) 720–3684; fax: (202) 720–6199; or e-mail: *khunter@csrees.usda.gov.*

SUPPLEMENTARY INFORMATION: The Specialty Crop Committee was established in accordance with the Specialty Crops Competitiveness Act of 2004 under Title III, Section 303 of Public Law 108–465. This Committee is a permanent committee of the National Agricultural Research Extension, Education, and Economics Advisory Board (the Board). The Committee's charge is to study the scope and effectiveness of research, extension, and economics programs affecting the specialty crop industry. The congressional legislation defines ''specialty crops'' as fruits, vegetables, tree nuts, dried fruits and nursery crops (including floriculture). In order to carry out its responsibilities effectively, the Committee is holding these stakeholder listening sessions. The Committee seeks stakeholder input from industry and state representatives, national organizations and institutions, local producers, agricultural researchers and extension educators, and other groups interested in the issues with which the Specialty Crop Committee is charged. Comments on measures to improve the efficiency, productivity, profitability and economic stability of specialty crop producers; on regional or national data or information needed by the industry to evaluate its competitive position; and on measures designed to improve the competitiveness of research, extension and economics programs affecting the industry are particularly sought. The format will focus on several panel sessions, each relating to one or more specific issues delineated in the Committee's charge. Each panel will be followed with questions or comments by Committee members and from the floor. Opportunities for brief presentations and general discussion from the public participants will be provided. Also, written comments by attendees and other interested stakeholders will be welcomed as additional public input before and up to two weeks following the listening sessions. All statements will become part of the official public record of the Board's Specialty Crop Committee.

Done at Washington, DC, this 24th day of July, 2008.

Gale A. Buchanan,

Under Secretary, Research, Education, and Economics.

[FR Doc. E8–17391 Filed 7–29–08; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–FV–08–0059; FV–08–380]

Notice of Funds Availability (NOFA) Inviting Applications for the Specialty Crop Block Grant Program-Farm Bill (SCBGP–FB)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of withdrawal and republication of Notice of Funds Availability (NOFA) Inviting Applications for the Specialty Crop Block Grant Program-Farm Bill (SCBGP–FB).

SUMMARY: The Agricultural Marketing Service (AMS) is withdrawing the July 9, 2008, **Federal Register** notice (73 FR 39278), which was published in error, announcing the availability of approximately $10 million in grant funds to enhance the competitiveness of specialty crops. Today's notice announces the availability of approximately $10 million in grant funds, less USDA administrative costs, to enhance the competitiveness of specialty crops. The funds announced under this program (SCBGP–FB) are separate from the Specialty Crop Block Grant Program (SCBGP) funds announced by AMS on March 5, 2008. SCBGP–FB funds are authorized by the recently enacted Food, Conservation, and Energy Act of 2008 (the Farm Bill). The application process to apply for the SCBGP–FB funds will parallel those currently found in 7 CFR Part 1290. Regulations to implement the amendments made in the 2008 Farm Bill will be published in the near future. State departments of agriculture are encouraged to develop their grant applications promptly. The 2008 Farm Bill makes the SCBGP–FB funds available only through the end of this fiscal year (September 30, 2008). This necessitates a short application period. State departments of agriculture interested in obtaining grant program

funds are invited to submit applications to USDA. State departments of agriculture, meaning agencies, commissions, or departments of a State government responsible for agriculture within the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands are eligible to apply. State departments of agriculture are encouraged to involve industry groups, academia, and community-based organizations in the development of applications and the administration of projects.

DATES: Applications must be received not later than September 8, 2008.

ADDRESSES: Applications may be sent to: SCBGP, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 0235, Room 2077 South Building, Washington, DC 20250–0235.

FOR FURTHER INFORMATION CONTACT: Trista Etzig, Phone: (202) 690–4942, *e-mail: trista.etzig@usda.gov* or your State department of agriculture listed on the SCBGP and SCBGP–FB Web site at *http://www.ams.usda.gov/fv/.*

SUPPLEMENTARY INFORMATION: SCBGP is authorized under Section 101 of the Specialty Crops Competitiveness Act of 2004 (7 U.S.C. 1621 note.) and is currently implemented under 7 CFR Part 1290 (published September 11, 2007; 71 FR 53303). Section 10109 of the Food, Conservation, and Energy Act of 2008, Public Law 110–246 (the 2008 Farm Bill), amends the Specialty Crops Competitiveness Act of 2004. AMS anticipates issuing regulations in the near future to implement the amendments made in the 2008 Farm Bill. The SCBGP and SCBGP–FB assist State departments of agriculture in enhancing the competitiveness of U.S. specialty crops.

Farm Bill 2008 Changes

Section 10109 of the 2008 Farm Bill amended the Specialty Crops Competitiveness Act of 2004 by adding Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands as eligible States and horticulture to the definition of specialty crop. Also, the minimum base grant each State is eligible to receive was amended to an amount that is equal to the higher of $100,000 or include 1/3 of 1 percent of the total amount of funding made available for that fiscal year. AMS anticipates issuing regulations in the near future to implement the amendments made in the 2008 Farm Bill.

SCBGP–FB

Under the SCBGP–FB, specialty crops are defined as fruits and vegetables, dried fruit, tree nuts, horticulture and nursery crops (including floriculture). Examples of enhancing the competitiveness of specialty crops include, but are not limited to: food safety, food security, nutrition, trade enhancement, education, research, promotion, marketing, plant health programs, ‘‘buy local’’ programs, increased consumption, increased innovation, improved efficiency and reduced costs of distribution systems, environmental concerns and conservation, product development, and developing cooperatives.

Each interested State department of agriculture is to submit one application on or before September 8, 2008 to the USDA contact noted in the **FOR FURTHER INFORMATION CONTACT** section. Applications will only be accepted for funding under this Notice. State departments of agriculture who have not yet applied for the fiscal year 2008 SCBGP grant funds (published March 5, 2008; 73 FR 11859) will not be able to apply for both fiscal year 2008 funds in one application. The deadline for funding under the previously announced SCBGP remains March 5, 2009. The deadline for funding under this Notice is September 8, 2008. As a result of the 2008 Farm Bill, in fiscal year 2008 AMS will be administering two separate programs to assist State departments of agriculture in enhancing the competitiveness of U.S. specialty crops. While similar, the SCBGP and SCBGP–FB are distinct with different definitions and separate deadlines. Other organizations interested in participating in this program should contact their State department of agriculture. State departments of agriculture specifically named under the authorizing legislation should assume the lead role in SCBGP–FB projects, and use cooperative or contractual linkages with other agencies, universities, institutions, and producer, industry or community-based organizations as appropriate.

Additional details about the SCBGP–FB application process for all applicants are available at the AMS Web site: *http://www.ams.usda.gov/fv/.*

To be eligible for a grant, each State department of agriculture's application shall be clear and succinct and include the following documentation satisfactory to AMS:

(a) Completed applications must include an SF–424 ‘‘Application for Federal Assistance’’.

(b) Completed applications must include one State plan to show how grant funds will be utilized to enhance the competitiveness of specialty crops. SCBGP–FB grant funds will be awarded for projects of up to 3 years duration. An application that builds on a previously funded SCBGP project may also be submitted. In such cases, the State plan should indicate clearly how the project compliments previous work. The state plan shall include the following:

(1) Cover page. Include the lead agency for administering the plan and an abstract of 200 words or less for each proposed project.

(2) Project purpose. Clearly state the specific issue, problem, interest, or need to be addressed. Explain why each project is important and timely.

(3) Potential Impact. Discuss the number of people or operations affected, the intended beneficiaries of each project, and/or potential economic impact if such data are available and relevant to the project(s).

(4) Financial Feasibility. For each project, provide budget estimates for the total project cost. Indicate what percentage of the budget covers administrative costs. Administrative costs should not exceed 10 percent of any proposed budget. Provide a justification if administrative costs are higher than 10 percent.

(5) Expected Measurable Outcomes. Describe at least two distinct, quantifiable, and measurable outcomes that directly and meaningfully support each project's purpose. The outcome measures must define an event or condition that is external to the project and that is of direct importance to the intended beneficiaries and/or the public.

(6) Goal(s). Describe the overall goal(s) in one or two sentences for each project.

(7) Work Plan. Explain briefly how each goal and measurable outcome will be accomplished for each project. Be clear about who will do the work. Include appropriate time lines. Expected measurable outcomes may be long term that exceed the grant period. If so, provide a timeframe when long term outcome measure will be achieved.

(8) Project Oversight. Describe the oversight practices that provide sufficient knowledge of grant activities to ensure proper and efficient administration.

(9) Project Commitment. Describe how all grant partners commit to and work toward the goals and outcome measures of the proposed project(s).

(10) Multi-State Projects. If a project is a multi-state project, describe how the States are going to collaborate effectively with related projects. Each

State participating in the project should submit the project in their State plan indicating which State is taking the coordinating role and the percent of the budget covered by each State.

Each State department of agriculture that submits an application that is reviewed and approved by AMS is to receive $100,000 to enhance the competitiveness of specialty crops. In addition, AMS will allocate the remainder of the grant funds based on the proportion of the value of specialty crop production in the state in relation to the national value of specialty crop production using the latest available (2006 National Agricultural Statistics Service (NASS) cash receipt data for the 50 States and the Commonwealth of Puerto Rico, 2002 Census of Agriculture for Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands, and 2003 Census of Agriculture for American Samoa) specialty crop production data in all states whose applications are accepted.

The amount of the base grant plus value of production available to each State department of agriculture shall be:

(1) Alabama—$125,779.00
(2) Alaska—$101,521.00
(3) American Samoa—$103,471.00
(4) Arizona—$182,056.00
(5) Arkansas—$107,059.00
(6) California—$1,661,482.00
(7) Colorado—$149,569.00
(8) Connecticut—$123,322.00
(9) Delaware—$106,240.00
(10) District of Columbia—$100,000.00
(11) Florida—$477,169.00
(12) Georgia—$186,541.00
(13) Guam—$100,273.00
(14) Hawaii—$124,765.00
(15) Idaho—$166,690.00
(16) Illinois—$132,565.00
(17) Indiana—$125,311.00
(18) Iowa—$108,541.00
(19) Kansas—$106,240.00
(20) Kentucky—$107,995.00
(21) Louisiana—$115,054.00
(22) Maine—$120,202.00
(23) Maryland—$131,941.00
(24) Massachusetts—$122,932.00
(25) Michigan—$203,740.00
(26) Minnesota—$136,231.00
(27) Mississippi—$109,771.00
(28) Missouri—$112,168.00
(29) Montana—$107,566.00
(30) Nebraska—$111,817.00
(31) Nevada—$104,017.00
(32) New Hampshire—$106,279.00
(33) New Jersey—$152,260.00
(34) New Mexico—$120,670.00
(35) New York—$189,895.00
(36) North Carolina—$208,537.00
(37) North Dakota—$125,740.00
(38) Northern Mariana Islands—$100,117.00
(39) Ohio—$168,562.00
(40) Oklahoma—$118,798.00
(41) Oregon—$240,868.00
(42) Pennsylvania—$181,081.00
(43) Puerto Rico—$120,631.00
(44) Rhode Island—$103,978.00
(45) South Carolina—$130,264.00
(46) South Dakota—$102,418.00
(47) Tennessee—$132,370.00
(48) Texas—$257,521.00
(49) Utah—$107,878.00
(50) Vermont—$103,861.00
(51) Virgin Islands—$100,078.00
(52) Virginia—$132,643.00
(53) Washington—$360,013.00
(54) West Virginia—$100,780.00
(55) Wisconsin—$161,035.00
(56) Wyoming—$101,755.00

Funds not obligated will be allocated pro rata to the remaining States which applied during the specified grant application period to be solely expended on projects previously approved in their State plan. In such event, a revised application shall be submitted, by a date before the end of the fiscal year, September 30, 2008, determined by AMS, showing how the additional funds will be utilized to enhance the competitiveness of specialty crops.

Applicants submitting hard copy applications should submit one copy of the application package. The SF–424 must be signed (with an original signature) by an official who has authority to apply for Federal assistance. Hard copy applications should be sent only via express mail to AMS at the address noted at the beginning of this notice because USPS mail sent to Washington DC headquarters is sanitized, resulting in possible delays, loss, and physical damage to enclosures. AMS will send an e-mail confirmation when applications arrive at the AMS office.

Applicants who submit hard copy applications are also encouraged to submit electronic versions of their application directly to AMS via e-mail addressed to *scblockgrants@usda.gov* in one of the following formats: Word (*.doc); or Adobe Acrobat (*.pdf). Alternatively, a standard 3.5 '' HD diskette or a CD may be enclosed with the hard copy application.

Applicants also have the option of submitting SCBGP–FB applications electronically through the central Federal grants Web site, *http://www.grants.gov* instead of mailing hard copy documents. Applicants considering the electronic application option are strongly urged to familiarize themselves with the Federal grants Web site and begin the application process well before the application deadline.

SCBGP–FB is listed in the ''Catalog of Federal Domestic Assistance'' under number 10.170 and subject agencies must adhere to Title VI of the Civil Rights Act of 1964, which bars discrimination in all federally assisted programs.

Authority: 7 U.S.C. 1621 note.

Dated: July 25, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–17477 Filed 7–29–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2008–0081]

Notice of Request for Extension of Approval of an Information Collection; Importation of Clementines From Spain

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of clementines from Spain.

DATES: We will consider all comments that we receive on or before September 29, 2008.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2008–0081* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0081, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0081.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information on regulations for the importation of clementines from Spain, contact Ms. Vanessa P. Schreier, Assistant Director, Preclearance Programs, PPQ, APHIS, 4700 River Road Unit 60, Riverdale, MD 20737; (301) 734–8259. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Clementines From Spain.

OMB Number: 0579–0203.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests, including fruit flies, into the United States or their dissemination within the United States. Regulations authorized by the PPA concerning the importation of fruits and vegetables into the United States from certain parts of the world are contained in ''Subpart–Fruits and Vegetables'' (7 CFR 319.56 through 319.56–47).

Under these regulations, clementines from Spain are subject to certain conditions before entering the United States to ensure that exotic plant pests, such as the Mediterranean fruit fly, are not introduced into the United States. The regulations require the use of information collection activities including a trust fund agreement, grower registration and agreement, a Mediterranean fruit fly management program, fruit fly trapping and control activities, recordkeeping, a phytosanitary certificate, and box labeling.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.0008904 hours per response.

Respondents: National plant health officials of Spain, and growers and shippers of clementines.

Estimated annual number of respondents: 4,508.

Estimated annual number of responses per respondent: 3,469.3234.

Estimated annual number of responses: 15,639,710.

Estimated total annual burden on respondents: 13,927 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 24th day of July 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–17464 Filed 7–29–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2008–0074]

Notice of Request for Extension of Approval of an Information Collection; Importation of Gypsy Moth Host Material From Canada

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection in support of regulations to prevent the introduction of gypsy moth from Canada into noninfested areas of the United States.

DATES: We will consider all comments that we receive on or before September 29, 2008.

ADDRESSES: You may submit comments by either of the following methods:

• Federal eRulemaking Portal: Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2008–0074* to submit or view comments and to view supporting and related materials available electronically.

• *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0074, Regulatory Analysis and Development, PPD, APHIS, Station3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0074.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information on regulations for the importation of gypsy moth host material from Canada, contact Mr. Weyman Fussell, Program Manager, Pest Detection and Management Program, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–5705. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS* Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Gypsy Moth Host Material From Canada.

OMB Number: 0579–0142.

Type of Request: Extension of approval of an information collection.

Abstract: As authorized by the Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, means of conveyance, or other article if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest or noxious weed from being introduced into or disseminated within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS), which administers regulations to implement the PPA. Regulations governing the importation of gypsy moth host material into the United States from Canada are contained in 7 CFR 319.77 through 319.77–5.

These regulations are intended to prevent the introduction of gypsy moth into noninfested areas of the United States by placing certain inspection and documentation requirements on gypsy moth host material (i.e., regulated articles) imported from Canada. These regulated articles are: Trees without roots (e.g., Christmas trees), trees with roots, shrubs with roots and persistent woody stems, logs and pulpwood with back attached, outdoor household articles, and mobile homes and their associated equipment. Under the regulations, phytosanitary certificates, certificates of origin, or signed homeowner statements will be required for some of these regulated articles, depending on their place of origin in Canada and their destination in the United States. These requirements necessitate the use of information collection activities.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.03632 hours per response.

Respondents: Canadian plant health authorities; growers, exporters, shippers of Christmas trees, shrubs, logs, pulpwood, and other articles from gypsy moth-infested Provinces in Canada; private individuals entering the United States with mobile homes or outdoor household articles.

Estimated annual number of respondents: 147.

Estimated annual number of responses per respondent: 15.1700.

Estimated annual number of responses: 2,230.

Estimated total annual burden on respondents: 81 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 24th day of July 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–17467 Filed 7–29–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2008–0069]

Notice of Request for Extension of Approval of an Information Collection; Health Certificates for Export of Live Crustaceans, Finfish, Mollusks, and Related Products

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with health certificates for the export of live crustaceans, finfish, mollusks, and related products.

DATES: We will consider all comments that we receive on or before September 29, 2008.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2008–0069* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0069, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0069.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information on health certificates for the export of live crustaceans, finfish, mollusks, and related products, contact Dr. Peter Merrill, Staff Veterinarian, Technical Trade Services Team, NCIE, VS, APHIS, 4700 River Road Unit 40, Riverdale, MD 20737; (301) 734–0649; or Dr. Gary Egrie, Staff Veterinarian, Aquaculture, Swine, Equine & Poultry Programs, NCAHP, VS, APHIS, 4700 River Road Unit 46, Riverdale, MD 20737; (301) 734–0695. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Health Certificates for Export of Live Crustaceans, Finfish, Mollusks, and Related Products.

OMB Number: 0579–0278.

Type of Request: Extension of approval of an information collection.

Abstract: The export of agricultural commodities, including animals and animal products, is a major business in the United States and contributes to a favorable balance of trade. To facilitate the export of U.S. animals and animal products, the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) maintains information regarding the import health requirements of other countries for animals and animal products exported from the United States.

Many countries that import animals or animal products from the United States require a certification that the United States is free of certain diseases. These countries may also require the certification statement to contain additional declarations regarding the U.S. animals or products being exported.

The regulations governing the export of animals and products from the United States are contained in 9 CFR part 91, subchapter D, ''Exportation and Importation of Animals (Including Poultry) and Animal Products,'' and apply to farm-raised aquatic animals and products, as well as other livestock and products. These regulations are authorized by the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*).

The National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Fish and Wildlife Service (FWS), U.S. Department of the Interior, as well as APHIS, have legal authorities and responsibilities related to aquatic animal health in the United States. All three agencies have, therefore, entered into a memorandum of understanding delineating their respective responsibilities in the issuance of health certificates for the export of live aquatic animals and animal products.

As a result of these shared responsibilities, three health certificates were developed that bear the logo of all three agencies. The certificates can be used by all three agencies for export health certifications for live crustaceans, finfish, mollusks, and their related products from the United States. In order for the agencies to complete these certificates, exporters must provide the names of the species being exported from the United States, their age and weight, if applicable, whether they are cultured stock or wild stock, their place of origin, their country of destination, and the date and method of transport. The certificates are completed by an accredited inspector (in the case of FWS or NMFS) or accredited veterinarian (in the case of APHIS) and must be signed by either the accredited inspector or accredited veterinarian who inspects the animals or products prior to their departure from the United States, as well as the appropriate Federal official (from either APHIS, FWS, or NMFS) who certifies the health status of the shipment being exported.

By endorsing the health certificates, these officials are certifying that (1) the aquatic animals or products in the consignment have been produced in a country, zone, or aquaculture establishment that has been subjected either to a health surveillance scheme recommended by the World Organization for Animal Health (OIE), or one recommended by the American Fisheries Society/Fish Health Section's *Standard Procedures for Aquatic Animal Health Inspections* (also known as the ''Blue Book''); and (2) the country, zone, or aquaculture establishment is officially recognized as being free from all of the pathogens causing the diseases identified on the specific health certificate being endorsed. (Each of the three health certificates lists a variety of diseases, depending on whether the certificate is for crustaceans, finfish, or mollusks.)

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning this information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.5 hours per response.

Respondents: Accredited inspectors or accredited veterinarians who complete the health certificates and producers who provide information for the health certificates to the accredited inspectors or accredited veterinarians.

Estimated annual number of respondents: 40.

Estimated annual number of responses per respondent: 5.

Estimated annual number of responses: 200.

Estimated total annual burden on respondents: 100 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 24th day of July 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–17474 Filed 7–29–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2008–0065]

Notice of Decision To Issue Permits for the Importation of Dragon Fruit From Vietnam Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our decision to begin issuing permits for the importation into the continental United States of dragon fruit from Vietnam. Based on the findings of a pest risk analysis, which we made available to the public for review and comment through a previous notice, we believe that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the importation of dragon fruit from Vietnam.

DATES: *Effective Date:* July 30, 2008.

FOR FURTHER INFORMATION CONTACT: Mr. Alex Belano, Import Specialist, Commodity Import Analysis and Operation Staff, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–5333.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart-Fruits and Vegetables'' (7 CFR 319.56 through 319.56–47, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

Section 319.56–4 of the regulations contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. Under that process, APHIS publishes a notice in the **Federal Register** announcing the availability of the pest risk analysis that evaluates the risks associated with the importation of a particular fruit or vegetable. Following the close of the 60-day comment period, APHIS may begin issuing permits for importation of the fruit or vegetable subject to the identified designated measures if: (1) No comments were received on the pest risk analysis; (2) the comments on the pest risk analysis revealed that no changes to the pest risk analysis were necessary; or (3) changes to the pest risk analysis were made in response to public comments, but the changes did not affect the overall conclusions of the analysis and the Administrator's determination of risk.

In accordance with that process, we published a notice [1] in the **Federal Register** on May 9, 2008 (73 FR 26360–26361, Docket No. APHIS–2008–0065), in which we announced the availability, for review and comment, of a pest risk analysis that evaluates the risks associated with the importation into the continental United States of dragon fruit from Vietnam. We solicited comments on the notice for 60 days ending on July 8, 2008. We received one comment by that date, from a private citizen. The commenter did not provide any information regarding the pest risk analysis. No changes to the pest risk analysis are necessary based on that comment.

Therefore, in accordance with the regulations in § 319.56–4(c)(2)(ii), we are announcing our decision to begin issuing permits for the importation into the continental United States of dragon fruit from Vietnam subject to the following phytosanitary measures:

- The dragon fruit must be irradiated with a minimum absorbed dose of 400 gray.
- Each consignment of dragon fruit must be accompanied by a phytosanitary certificate issued by the national plant protection organization (NPPO) of Vietnam. The phytosanitary certificate must document that the dragon fruit has been inspected by the NPPO of Vietnam and that the consignment received the required irradiation treatment or that the consignment will receive the required treatment upon arrival in the continental United States, should an APHIS-approved facility exist.
- The dragon fruit may be imported to the United States in commercial consignments only.

These conditions will be listed in the fruits and vegetables manual (available at *http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/fv.pdf*). In addition to those specific measures, dragon fruit from Vietnam will be subject to the general requirements listed in § 319.56–3 that are applicable to the importation of all fruits and vegetables.

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 24th day of July 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–17476 Filed 7–29–08; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice, the pest risk analysis, and the comment we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2008–0065.*

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Report of the Child and Adult Care Food Program

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on proposed information collections. The proposed collection is an extension of a currently approved collection. The purpose of the Report of the Child and Adult Care Food Program is to collect Program activity information from eligible programs that provide nutritious meals and snacks to Program participants.

DATES: Written comments must be submitted by September 29, 2008.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments maybe sent to: Ms. Cynthia Long, Director, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 638, Alexandria, Virginia 22302. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov*, and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for OMB approval, and will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Request for additional information or copies of the information collection form and instructions should be directed to: Ms. Cynthia Long at (703) 305–2590.

SUPPLEMENTARY INFORMATION:

Title: Report of the Child and Adult Care Food Program.

OMB Number: 0584–0078.

Form Number: FNS–44.

Expiration Date: March 31, 2009.

Type of Request: Extension of a currently approved collection.

Abstract: The purpose of the Report of the Child and Adult Care Food Program is to collect information from eligible programs that provide nutritious meals and snacks to Program participants. The Child and Adult Care Food Program is mandated by Section 17 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1766). Program implementing regulations are contained in 7 CFR part 226. In accordance with 226.7(d), State agencies must submit a monthly report of program activity in order to receive Federal reimbursement for meals served to eligible participants.

Affected Public: State Agencies.

Estimated Time per Response: 3 hours.

Estimated Number of Respondents: 55 respondents.

Estimated Number of Annual Responses per Respondent: 12 responses.

Estimated Total Annual Burden on Respondents: 1,980 annual burden hours.

Dated: July 22, 2008.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. E8–17372 Filed 7–29–08; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Change to the Natural Resources Conservation Service's National Handbook of Conservation Practices

AGENCY: Natural Resources Conservation Service, USDA, Idaho State Office.

ACTION: Notice of availability of proposed changes in the NRCS National Handbook of Conservation Practices, Section IV of the Idaho State NRCS Field Office Technical Guide (FOTG) for review and comment.

SUMMARY: It is the intention of the NRCS in Idaho to issue a revised conservation practice standards in its National Handbook of Conservation Practices. The revised standard is: Filter Strip (393).

DATES: Comments will be received for a 30-day period commencing with this date of publication.

FOR FURTHER INFORMATION CONTACT: Inquire in writing to Jeff Burwell, State Conservationist, Natural Resources Conservation Service (NRCS), 9173 W. Barnes Dr., Suite C, Boise, Idaho 83709. Copies of the practice standards will be made available upon written request. You may also submit your electronic requests and comments to *Linda.Miller@id.usda.gov*.

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that revisions made after enactment of the law to NRCS State Technical Guides used to carry out highly erodible land and wetland provisions of the law shall be made available for public review and comment. For the next 30 days, the NRCS in Idaho will receive comments relative to the proposed changes. Following that period, a determination will be made by the NRCS in Idaho regarding disposition of those comments and a final determination of change will be made.

Dated: July 14, 2008.

Jeff Burwell,

State Conservationist, Boise, Idaho.

[FR Doc. E8–17392 Filed 7–29–08; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–832, C–351–833, A–560–815, A–201–830, A–841–805, A–274–804, A–823–812]

Carbon and Certain Alloy Steel Wire Rod From Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Continuation of Antidumping and Countervailing Duty Orders

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 4, 2007, the Department of Commerce (''the Department'') initiated sunset reviews of the antidumping duty (''AD'') orders on carbon and certain alloy steel wire rod (''wire rod'') from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine; and the countervailing duty (''CVD'') order on wire rod from Brazil. *See Initiation of Five-year (''Sunset'') Reviews,* 72 FR 50659 (September 4, 2007). As a result of the determinations by the Department and the U.S. International Trade Commission (''ITC'') that revocation of the AD orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, and the CVD order on wire rod from Brazil would likely lead to continuation or recurrence of dumping and countervailable subsidies, and material injury to an industry in the United States, the Department is publishing a notice of continuation of these AD and CVD orders.

DATES: *Effective Date:* July 30, 2008.

FOR FURTHER INFORMATION CONTACT: Shelly Atkinson or Brandon Farlander, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0116 and 482–0182, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 22, 2002, the Department published the CVD orders on wire rod from Brazil and Canada. *See Notice of Countervailing Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil and Canada,* 67 FR 64871 (October 22, 2002). Additionally, the Department published the AD orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine on October 29, 2002. *See Notice of Antidumping Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* 67 FR 65945 (October 29, 2002). On January 23, 2004, the CVD order on wire rod from Canada was revoked, pursuant to a changed circumstance review. *See* 69 FR 3330 (January 23, 2004).

On September 4, 2007, the Department initiated and the ITC instituted sunset reviews of the AD orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, and the CVD order on wire rod from Brazil pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-year Sunset Reviews,* 72 FR at 50659; *see also Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* 72 FR 50696 (September 4, 2007). Additionally, on December 28, 2007, the ITC determined to conduct full five-year reviews concerning the CVD and AD orders. *See Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* 72 FR 73880 (December 28, 2007).

As a result of its reviews, the Department found that revocation of the AD and CVD orders would likely lead to continuation or recurrence of dumping and countervailable subsidies, and notified the ITC of the magnitude of the margins and net countervailable subsidies likely to prevail were the orders to be revoked. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders,* 73 FR 1321 (January 8, 2008) and accompanying Issues and Decision Memorandum; *see also Carbon and Certain Alloy Steel Wire Rod from Brazil: Final Results of Expedited Five-year Sunset Review of the Countervailing Duty Order,* 73 FR 1323 (January 8, 2008) and accompanying Issues and Decision Memorandum.

On July 17, 2008, the ITC published its determination pursuant to section 751(c) of the Act, that revocation of the AD orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, and the CVD order on wire rod from Brazil would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See ITC Final Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* Investigation Nos. 701–TA–417 and

731–TA–953, 954, 957–959, 961, and 962 (Review) 73 FR 41116 (July 17, 2008) (''*ITC Wire Rod Final Determination*''); and *Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine,* USITC Publication 4014, Investigation Nos. 701–TA–417 and 731–TA–953, 954, 957–959, 961, and 962 (Review) (June 2008).

With respect to the AD order on wire rod from Canada, the ITC determined that revocation of order would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to section 751(c) of the Act. *See ITC Wire Rod Final Determination.* Therefore, pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(1)(iii), the Department is revoking the AD order on wire rod from Canada in a separate **Federal Register** notice.

Scope of the Orders

The merchandise subject to these orders is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (''HTSUS'') definitions for (a) Stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (i.e., products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. Grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

Grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified). For purposes of grade 1080 tire cord quality wire rod and grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis—that is, the direction of rolling of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod. This measurement methodology applies only to inclusions on certain grade 1080 tire cord quality wire rod and certain grade 1080 tire bead quality wire rod that are entered, or withdrawn from warehouse, for consumption on or after July 24, 2003.

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications; end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise. All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products subject to this order are currently classifiable under subheadings 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, and 7227.90.6085 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.[1]

Determination

As a result of the determinations by the Department and the ITC that revocation of these AD and CVD orders would likely lead to continuation or recurrence of dumping and countervailable subsidies; as well as material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the AD orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, and the CVD order on wire rod from Brazil. Therefore, CBP will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of continuation of these orders will be the date of publication in the **Federal Register** of this Notice of Continuation. Pursuant to section 751(c)(2) of the Act, the

[1] Effective July 1, 2008, U.S. Customs and Border Protection (''CBP'') reclassified certain HTSUS numbers related to the subject merchandise. *See http: //hotdocs.usitc.gov/tariff—chapters—current/toc.html.*

Department intends to initiate the next five-year review of these orders not later than June 2013.

These five-year sunset reviews and this notice are in accordance with section 751(c) of the Act. This notice is published pursuant to 751(c) and 771(i) of the Act and 19 CFR 351.218(f)(4).

Dated: July 23, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–17486 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–821]

Hot-Rolled Carbon Steel Products From India: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: July 30, 2008.

FOR FURTHER INFORMATION CONTACT: Gayle Longest, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, Room 4014, 14th Street and Constitution Ave., NW., Washington, DC 20230, telephone: (202) 482–3338.

SUPPLEMENTARY INFORMATION:

Background

On January 28, 2008, the U.S. Department of Commerce (''the Department'') published a notice of initiation of the administrative review of the countervailing duty order on hot-rolled carbon steel products from India covering the period January 1, 2007, through December 31, 2007. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 73 FR 4829 (January 28, 2008). The preliminary results are currently due no later than September 1, 2008.

Extension of Time Limit for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to make a preliminary determination within 245 days after the last day of the anniversary month of an order for which a review is requested. Section 751(a)(3)(A) of the Act further states that if it is not practicable to complete the review within the time period specified, the administering authority may extend the 245-day period to issue its preliminary results to up to 365 days.

Due to the complexity of the issues in this administrative review, such as the absence of exports during the POR and the petitioners' request for verification, we have determined that it is not practicable to complete the preliminary results within the 245-day period. Therefore, in accordance with section 751(a)(3)(A) of the Act, we are partially extending the time period for issuing the preliminary results of the review by 109 days. The preliminary results are now due no later than December 19, 2008. The final results continue to be due 120 days after publication of the preliminary results.

This notice is issued and published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: July 24, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–17483 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with June anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews. The Department also received a request to revoke one antidumping duty order in part and to defer the initiation of an administrative review for another antidumping duty order.

EFFECTIVE DATE: July 30, 2008.

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, *telephone:* (202) 482–4697.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b)(2002), for administrative reviews of various antidumping and countervailing duty orders and findings with June anniversary dates. The Department also received a timely request to revoke in part the antidumping duty order on stainless steel butt-weld pipe fittings from Taiwan with respect to one exporter. In addition, the Department received a request to defer for one year the initiation of the June 1, 2007 through May 31, 2008 administrative review of the antidumping duty order on Folding Metal Tables and Chairs from the People's Republic of China with respect to one exporter in accordance with 19 CFR 351.213(c). The Department received no objections to this request from any party cited in 19 CFR 351.213(c)(1)(ii).

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review (POR). We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of this initiation notice and to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within 10 calendar days of publication of this **Federal Register** notice.

Separate Rates

In proceedings involving non-market economy (''NME'') countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (''*Sparklers*''), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*''). In accordance with the separate-rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate-rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate-rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate-rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register**. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 30 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

For entities that have not previously been assigned a separate rate, to demonstrate eligibility for such, the Department requires a Separate Rate Status Application. The Separate Rate Status Application will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 60 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

Initiation of Reviews

In accordance with section 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than June 30, 2009. Also in accordance with 19 CFR 351.213(c), we deferring for one year the iniation of the June 1, 2007 through May 31, 2008 Administrative review of the antidumping duty order on Folding Metal Tables and Chairs from the People's Republic of China with respect to one exporter.

	Period to be reviewed
Antidumping Duty Proceedings	
Japan: Certain Large Diameter Carbon and Alloy Seamless, Standard, Line, and Pressure Pipe,–588–850	6/1/2007–5/31/2008
JFE Steel Corporation	
Nippon Steel Corporation	
NKK Tubes	
Sumitomo Metal Industries, Ltd.	
Japan: Hot-Rolled Carbon Steel Flat Products, A–588–846	6/1/2007–05/31/2008
JFE Steel Corporation	
Nippon Steel Corporation	
Kobe Steel, Ltd.	
Spain: Chlorinated Isocyanurates, A–469–814	6/1/2007–5/31/2008
Aragonesas Industrias y Energia	
Inquide Flix, S.A.	
South Korea: Polyethylene Terephthalate Film, Sheet, and Strip, A–580–807	10/2/2007–5/31/2008
Kolon Industries, Inc.	
Taiwan: Certain Stainless Steel Butt-Weld Pipe Fittings, A–583–816	6/1/2007–5/31/2008
Ta Chen Stainless Pipe Co., Ltd.	
Liang Feng Stainless Steel Fitting Co., Ltd.	
Liang Feng Enterprise	
Tru-Flow Industrial Co., Ltd.	
Censor International Corporation	
PFP Taiwan Co., Ltd.	
The People's Republic Of China: Certain Color Television Receivers [1], A–570–884	6/1/2007–5/31/2008
Haier Electric Appliances International Co.	
Hisense Import and Export Co., Ltd.	
Konka Group Company, Ltd.	
Philips Consumer Electronics Co. of Suzhou Ltd.	
Shenzhen Chaungwei-RGB Electronics Co., Ltd.	
Sichuan Changhong Electric Co., Ltd.	
Starlight International Holdings, Ltd.	
Star Light Electronics Co., Ltd.	
Star Fair Electronics Co., Ltd.	
Starlight Marketing Development Ltd.	
SVA Group Co., Ltd.	
TCL Holding Company Ltd.	
Xiamen Overseas Chinese Electronic Co., Ltd.	
The People's Republic Of China: Certain Polyester Staple Fiber [2], A–570–905	12/26/2006–5/31/2008
Far Eastern Industries, Ltd., (Shanghai) and Far Eastern Polychem Industries	
Ningbo Dafa Chemical Fiber Co., Ltd.	

	Period to be reviewed
Cixi Sansheng Chemical Fiber Co., Ltd.	
Cixi Santai Chemical Fiber Co., Ltd.	
Cixi Waysun Chemical Fiber Co., Ltd.	
Hangzhou Best Chemical Fibre Co., Ltd.	
Hangzhou Hanbang Chemical Fibre Co., Ltd.	
Hangzhou Huachuang Co., Ltd.	
Hangzhou Sanxin Paper Co., Ltd.	
Hangzhou Taifu Textile Fiber Co., Ltd.	
Jiaxang Fuda Chemical Fibre Factory	
Nantong Loulai Chemical Fiber Co., Ltd.	
Nanyang Textile Co., Ltd.	
Suzhou PolyFiber Co., Ltd.	
Xiamen Xianglu Chemical Fiber Co.	
Zhaoqing Tifo New Fiber Co., Ltd.	
Zhejiang Anshun Pettechs Fibre Co., Ltd.	
Zhejiang Waysun Chemical Fiber Co., Ltd.	
Dragon Max Trading Development	
Xiake Color Spinning Co., Ltd.	
Jiangyin Hailun Chemical Fiber Co., Ltd.	
Hyosung Singapore PTE Ltd.	
Jiangyin Changlong Chemical Fiber Co., Ltd.	
Ma Ha Company, Ltd.	
Jiangyin Huahong Chemical Fiber Co., Ltd.	
Jiangyin Mighty Chemical Fiber Co., Ltd.	
Huvis Sichuan	
The People's Republic Of China: Chlorinated Isocyanurates [3], A–570–898	6/1/2007–5/31/2008
Hebei Jiheng Chemical Company Ltd.	
The People's Republic Of China: Folding Metal Tables and Chairs [4], A–570–868	6/1/2007–5/31/2008
Dongguan Shichang Metals Factory Co., Ltd.	
New-Tec Integration Co., Ltd.	
New-Tec Integration (Xiamen) Co., Ltd.	
The People's Republic Of China: Non-Frozen Apple Juice Concentrate [5], A–570–855	6/1/2007–5/31/2008
Yitian Juice (Shaanxi) Co., Ltd.	
The People's Republic Of China: Silicon Metal [6], A–570–806	6/1/2007–5/31/2008
Shanghai Jinneng International Trade Co., Ltd.	
Datong Jinneng Industrial Silicon Co., Inc.	
Jiangxi Gangyuan Silicon Industry Company, Ltd.	
S. AU (Guilin) Trade Co., Ltd.	
Lao Silicon Co., Ltd.	
The People's Republic Of China: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished [7], A–570–601	6/1/2007–5/31/2008
Peer Bearing Company–Changshan	
Countervailing Duty Proceeding	
None.	
Suspension Agreements	
None.	
Deferral of Initiation of Administrative Review	
The People's Republic Of China: Folding Metal Tables and Chairs, A–570–868	6/1/2007–5/31/2008
Feili Furniture Development Ltd. Quanzhou City	
Feili Furniture Development Co., Ltd.	
Feili Group (Fujian) Co., Ltd.	
Feili (Fujian) Co., Ltd.	

[1] If one of the above-named companies does not qualify for a separate rate, all other exporters of Certain Color Televisions Receivers from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[2] If one of the above-named companies does not qualify for a separate rate, all other exporters of Certain Polyester Staple Fiber from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[3] If the above-named company does not qualify for a separate rate, all other exporters of Chlorinated Isocyanurates from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[4] If one of the above-named companies does not qualify for a separate rate, all other exporters of Folding Metal Tables and Chairs from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[5] If one of the above-named companies does not qualify for a separate rate, all other exporters of Non-Frozen Apple Juice Concentrate from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[6] If one of the above-named companies does not qualify for a separate rate, all other exporters of Silicon Metal from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[7] If the above-named company does not qualify for a separate rate, all other exporters of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under section 351.211 or a determination under section 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States,* 291 F.3d 806 (Fed. Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures* (73 FR 3634). Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.*, the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)), and 19 CFR 351.221(c)(1)(i).

Dated: July 24, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–17485 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–122–840

Revocation of Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 4, 2007, the Department of Commerce (''the Department'') initiated the sunset review of the antidumping duty (''AD'') order on carbon and certain alloy steel wire rod (''wire rod'') from Canada. *See Initiation of Five-year (''Sunset'') Reviews*, 72 FR 50659 (September 4, 2007). Pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the U.S. International Trade Commission (''ITC'') determined that revocation of the existing AD order on wire rod from Canada would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See ITC Final Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 73 FR 41116 (July 17, 2008) (''*ITC Wire Rod Final Determination*''). Therefore, pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(1)(iii), the Department is revoking the AD order on wire rod from Canada.

EFFECTIVE DATE: October 29, 2007.

FOR FURTHER INFORMATION CONTACT: Shelly Atkinson or Brandon Farlander, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0116 and (202) 482–0182, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 29, 2002, the Department published the amended AD final determination and AD order on wire rod from Canada. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 FR 65944 (October 29, 2002). On September 4, 2007, the Department initiated, and the ITC instituted, the sunset review of the AD order on wire rod from Canada. *See Initiation of Five-year Sunset Reviews*, 72 FR at 50659.

As a result of the Department's sunset review, the Department determined that revocation of the AD order would be likely to lead to the continuation or recurrence of dumping. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders*, 73 FR 1321 (January 8, 2008) and accompanying Issues and Decision Memorandum. The Department notified the ITC of the magnitude of the margin likely to prevail were the AD order to be revoked.

On July 17, 2008, the ITC published its determination, pursuant to section 751(c) of the Act, that revocation of the AD order on wire rod from Canada would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See ITC Wire Rod Final Determination*, at 73 FR at 41116; and *Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, USITC Pub. 4014, Investigation Nos. 701–TA–417 and 731–TA–953, 954, 957–959, 961, and 962 (Review) (June 2008).

Scope of the Orders

The merchandise subject to these orders is certain hot–rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above–noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (''HTSUS'') definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (i.e., products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. Grade 1080 tire cord quality rod is defined as: (i) grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non–deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1)

0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

Grade 1080 tire bead quality rod is defined as: (i) grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no non–deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified). For purposes of grade 1080 tire cord quality wire rod and grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis - that is, the direction of rolling - of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod. This measurement methodology applies only to inclusions on certain grade 1080 tire cord quality wire rod and certain grade 1080 tire bead quality wire rod that are entered, or withdrawn from warehouse, for consumption on or after July 24, 2003.

The designation of the products as ''tire cord quality'' or ''tire bead quality'' indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications; end–use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise. All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products subject to this order are currently classifiable under subheadings 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0090, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, and 7227.90.6085 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.[1]

Determination

As a result of the determination by the ITC that revocation of the AD order is not likely to lead to the continuation or recurrence of material injury to an industry in the United States, the Department, pursuant to section 751(d) of the Act, is revoking the AD order on wire rod from Canada. Pursuant to section 751(d) of the Act and 19 CFR 351.222(i)(2)(i), the effective date of revocation is October 29, 2007. The Department will notify CBP to terminate suspension of liquidation and collection of cash deposits on entries of the subject merchandise entered or withdrawn from warehouse on or after October 29, 2007. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to suspension of liquidation and antidumping duty deposit requirements. The Department will complete any pending administrative reviews of these orders and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

[1] Effective July 1, 2008, U.S. Customs and Border Protection (''CBP'') reclassified certain HTSUS numbers related to the subject merchandise. See http: //hotdocs.usitc.gov/ tariff--chapters--current/ toc.html.

These five-year sunset reviews and notice are in accordance with section 751(d)(2) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: July 23, 2008.

David Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–17481 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XJ23

Endangered Species; File No. 10027

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that the Center for Biodiversity and Conservation, American Museum of Natural History (AMNH), Central Park West at 79th Street, New York, New York 10024, has been issued a permit to take green (*Chelonia mydas*) and hawksbill (*Eretmochelys imbricata*) sea turtles for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521;

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI 96814–4700; phone (808)944–2200; fax (808)973–2941.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Patrick Opay, (301)713–2289.

SUPPLEMENTARY INFORMATION: On November 16, 2007, notice was published in the **Federal Register** (72 FR 64584) that a request for a scientific research permit to take green and hawksbill sea turtles had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The AMNH is authorized a 5–year research permit to study green and hawksbill sea turtles at the Palmyra Atoll in the Pacific Ocean. Researchers may capture by hand or net, examine, measure, photograph, flipper and Passive Integrated Transponder tag, blood sample, carapace sample, shell etch and paint, fecal sample, measure their temperature, and release up to 300 green and 100 hawkbill sea turtles annually. The purpose of this work is to assess the population biology and connectivity of green and hawksbill sea turtles focusing on distribution and abundance, ecology, health, threats to sea turtles as well as implications for their management and conservation. A subset of animals may be gastric lavaged or have transmitters affixed to the carapace before release. Additionally, researchers are authorized to collect the carcass, tissues and/or parts of encountered dead animals from 30 green and 10 hawksbill sea turtles annually.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: July 23, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–17465 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XI89

Endangered Species; File No. 1551

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that the Southeast Fisheries Science Center (SEFSC), National Marine Fisheries Service (NMFS), 75 Virginia Beach Drive Miami, Florida 33149, has been issued a permit to take green (*Chelonia mydas*), loggerhead (*Caretta caretta*), hawksbill (*Eretmochelys imbricata*), olive ridley (*Lepidochelys olivacea*), leatherback (*Dermochelys coriacea*), and Kemp's ridley (*Lepidochelys kempii*) sea turtles for purposes of scientific research.

ADDRESSES: The permits and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Amy Hapeman, (301)713–2289.

SUPPLEMENTARY INFORMATION: On February 7, 2006, notice was published in the **Federal Register** (71 FR 6272) that a request for scientific research permit to take sea turtles had been submitted by the above-named institution. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The research will be conducted each year over the course of a five-year permit in coastal and inshore waters of the North Atlantic, Gulf of Mexico and Caribbean Sea (including embayments and tributaries). Turtles will be taken by harassment (e.g., aerial surveys) and direct capture (pound nets, entanglement/strike nets, seine nets, hoop nets, dipnets, cast nets, and by hand). Researchers will also access animals legally captured incidental to fishing activities where covered by the incidental take statement (ITS) of an ESA section 7 biological opinion or by an ESA incidental take permit. Animals used in this research could also be obtained from other Section 10 permitted research activities. Researchers will conduct a variety sampling and tagging activities in order to collect biological and ecological information on these species that will help efforts to conserve them.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: July 25, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–17469 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XJ29

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery off the Southern Atlantic States

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of receipt of an application for an exempted fishing permit; request for comments.

SUMMARY: NMFS announces the receipt of an application for an exempted fishing permit (EFP) from Tom Burgess of Sneads Ferry, North Carolina. If granted, the EFP would authorize the applicant, with certain conditions, to collect limited numbers of snapper and grouper using chevron traps, a prohibited gear type, and compare results from inside and outside a proposed marine protected area (MPA). Acoustic sonar would be utilized to collect catch-per unit-effort (CPUE) data. This study is intended to collect data to develop a model for estimating deep-water snapper-grouper abundance in South Atlantic Federal waters.

DATES: Comments must be received no later than 5 p.m., Eastern time, on August 29, 2008.

ADDRESSES: You may submit comments on the application by any of the following methods:

- e-mail: *Burgess.EFP@noaa.gov*. Include in the subject line the following: ''Comment on Burgess EFP Application.''
- Fax: 727–824–5308, Attn: Kate Michie.
- Mail: Kate Michie, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

The application and related documents are available for review upon written request to the address above or the e-mail address below.

FOR FURTHER INFORMATION CONTACT: Kate Michie, 727–824–5305; fax 727–824–5308; e-mail: *Kate.Michie@noaa.gov*.

SUPPLEMENTARY INFORMATION: The EFP is requested under the authority of the

Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C 1801 *et seq.*), as amended in 2006, and regulations at 50 CFR 600.745(b) concerning exempted fishing.

The proposed collection for scientific research involves activities otherwise prohibited by regulations implementing the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region. The applicant requires authorization to harvest and possess snapper and grouper using a prohibited gear type for scientific research activities during the period May through December 2008. Specimens would be collected from Federal waters off the coast of North Carolina.

The applicant's EFP application responds to a NMFS call for development of new, advanced technologies to assess fish stocks, and is the second phase of a two-pronged research endeavor funded by the Fishery Resource Grant Program. Phase one of the pilot survey included the collection of acoustic data using sonar, as well as CPUE (hook-and-line) data within a proposed MPA known as the Snowy Wreck MPA off North Carolina. That data collection was completed October 16, 2007, and indicates the use of high-end sonar gear shows promise of being able to predict relative abundance of deepwater snapper-grouper species from a much larger number of fish aggregations where acoustic data were collected but the area was not fished.

Phase two of the project (current proposal) proposes to use a novel census technique for deepwater snapper-grouper and lay the framework for a Before-After Control Impact (BACI) sampling design, by sampling inside the proposed Snowy Wreck MPA (experimental site), and two adjacent control sites, before NMFS establishes the MPA through the rulemaking process. It is expected that sampling within the experimental site and within the control site, before the MPA is implemented, will allow future comparisons of CPUE and acoustic backscatter once NMFS has implemented the MPA for some years. The overall intent of this project is to develop models to the extent that fishery managers may use acoustic data to reliably predict the abundance of important deepwater snapper-grouper species.

Phase two of this project proposes to use acoustic sonar, along with chevron traps, to develop a predictive model to estimate abundance of deepwater snapper-grouper species. Hook-and-line data would be collected opportunistically and would be used to augment existing models created using hook-and-line data from phase one. Those models would be compared to models created using chevron trap data from phase two of the project. Any live fish collected will be tagged and released. Dead or non-viable fish will be provided to the NMFS Beaufort Lab for further study. Estimates of acoustic data collected in the proposed Snowy Wreck MPA would be compared to those collected at the adjacent control site.

NMFS finds this application warrants further consideration. Based on a preliminary review, NMFS intends to issue an EFP. Possible conditions the agency may impose on this permit, if it is indeed granted, include but are not limited to, a prohibition of conducting research within other MPAs, marine sanctuaries, or special management zones, without additional authorization. Additionally, NMFS may prohibit the possession of Nassau or goliath grouper, and require any sea turtles taken incidentally during the course of fishing or scientific research activities to be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water. A final decision on issuance of the EFP will depend on NMFS review of public comments received on the application, consultations with the affected state, the South Atlantic Fishery Management Council, and the U.S. Coast Guard, and a determination that it is consistent with all applicable laws.

Authority: 16 U.S.C 1801 *et seq.*

Dated: July 24, 2008.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–17405 Filed 7–29–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08–67]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–67 with attached transmittal, and policy justification.

July 22, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–6–M

DEFENSE SECURITY COOPERATION AGENCY
2800 DEFENSE PENTAGON
WASHINGTON, DC 20301-2800

JUL 18 2008

In reply refer to:
USP006270-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-67, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to the Kingdom of Saudi Arabia for defense articles and services estimated to cost $1.8 billion. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Richard J. Millies
Acting Director

Enclosures:
1. Transmittal
2. Policy Justification

Same ltr to:

House	Senate
Committee on Foreign Affairs	Committee on Foreign Relations
Committee on Armed Services	Committee on Armed Services
Committee on Appropriations	Committee on Appropriations

Transmittal No. 08-67

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended

(i) Prospective Purchaser: Saudi Arabia

(ii) Total Estimated Value:

Major Defense Equipment*	$ 0 billion
Other	$1.8 billion
TOTAL	$1.8 billion

(iii) Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: for the continuation of the United States supported effort to modernize the Saudi Arabian National Guard (SANG) by providing the following defense services: training, professional military advice and assistance, management assistance, contract administration, construction oversight, transportation of equipment, personnel training and training equipment, light armored vehicle training, spare and repair parts, management of repair and return of components, automation program support, and other related elements of logistics support. These support services would be for the period 1 January 2009 through 31 December 2013.

(iv) Military Department: Army (ZAC, Amendment 39)

(v) Prior Related Cases, if any: numerous cases dating back to 1973

(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none

(vii) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: none

(viii) Date Report Delivered to Congress: JUL 18 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Saudi Arabia - Continued Assistance in the Modernization of the SANG

The Government of Saudi Arabia has requested a possible sale for the continuation of the United States supported effort to modernize the Saudi Arabian National Guard (SANG) by providing the following defense services: training, professional military advice and assistance, management assistance, contract administration, construction oversight, transportation of equipment, personnel training and training equipment, light armored vehicle training, spare and repair parts, management of repair and return of components, automation program support, and other related elements of logistics support. These support services would be for the period 1 January 2009 through 31 December 2013. The estimated cost is $1.8 billion.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country which has been and continues to be an important force for political stability and economic progress in the Middle East.

The continuation of services under the SANG Modernization Program is an evolution of the SANG as an effective defensive force with the advice, assistance, and training of the U.S. Army. The Modernization Program ensures necessary training, logistics, support, doctrine development and force integration for the continuing expansion and use of their weapon systems. These services will remain the cornerstone of an effort to upgrade and enhance the infrastructure of the SANG organization.

The proposed sale of this support will not affect the basic military balance in the region.

The principal contractor will be Vinnell Arabia Corporation of Herndon, VA. There are no known offset agreements proposed in connection with this potential sale.

At present, there are approximately 215 U.S. Government personnel and 500 contractor representatives in country supporting the SANG Modernization Program.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. E8–17326 Filed 7–29–08; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On July 22, 2008, a 30-day notice (Vol. 73, Number 141, page 42552) was published for the information collection, Family Educational Rights and Privacy Act (FERPA) Regulatory Requirements. In that notice 1,666,013 responses were provided. This correction notice provides the correct number of responses as 19,958,860. The burden hours remain the same at approximately 1,666,014 hours.

The Acting IC Clearance Official, Regulatory Information Management Services, Office of Management, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: July 25, 2008.

Kate Mullan,

Acting Leader, Information Policy and Standards Team, Regulatory Information Management Services, Office of Management.

[FR Doc. E8–17453 Filed 7–29–08; 8:45 am]
BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Overview Information; Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities—Center on Positive Behavioral Supports; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2008.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.326S.

Dates:

Applications Available: July 30, 2008.

Deadline for Transmittal of Applications: August 29, 2008.

Deadline for Intergovernmental Review: September 8, 2008.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities program is to promote academic achievement and to improve results for children with disabilities by providing technical assistance (TA), supporting model demonstration projects, disseminating useful information, and implementing activities that are supported by scientifically based research.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified or otherwise authorized in the statute (see sections 663 and 681(d) of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*).

Absolute Priority: For FY 2008 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities—Center on Positive Behavioral Supports.

Background

The 1997 amendments to IDEA introduced the requirement that individualized education program (IEP) teams consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior of a child with disabilities whose behavior impedes the child's learning or that of others. In response, the Office of Special Education Programs (OSEP) funded the Technical Assistance Center on Positive Behavioral Interventions and Supports (PBIS Center I) in 1998 to assist State educational agencies (SEAs) and local educational agencies (LEAs) address this new statutory requirement.

PBIS Center I adapted and built upon a mental health prevention model to address behavioral problems in schools and programs (e.g., early childhood and juvenile justice programs), and developed a framework for implementing school-wide and program-wide positive behavioral supports (PBS). The framework consisted of the following three levels of interventions: primary, secondary, and tertiary. Primary interventions are system-wide strategies that support the appropriate behavior of all students in a school or program. Secondary interventions are targeted interventions for students at-risk for behavioral problems. Tertiary interventions are the most intensive and consist of individualized interventions for students exhibiting more serious behavioral problems. PBIS Center I studied the evidence base for implementing primary, secondary, and tertiary interventions in schools and programs, and began to identify the school and program components (e.g., training, coaching, and leadership) needed to support implementation of the three levels of interventions.

The second iteration of the PBIS Center (PBIS Center II), funded in 2003, continued the work of PBIS Center I and strengthened the evidence base for implementing primary, secondary, and tertiary interventions in schools and programs by evaluating, documenting, and disseminating information on the implementation of PBS components, identified during PBIS Center I, in a variety of demonstration sites. PBIS Center II also continued to identify and further develop school and program components needed for successful implementation of PBS, including among others, systems that support training and coaching for staff supporting the implementation of PBS, and collecting and using data to scale up and sustain PBS. In addition, PBIS Center II provided TA to SEAs and LEAs to develop their capacity to implement and sustain these components in schools or programs. (For additional information on the work of PBIS Center II, go to *http://www.pbis.org*).

PBIS Center II focused primarily on implementing, scaling up, and sustaining primary interventions needed to support positive behaviors and prevent problem behaviors in all students in a school or program, and identifying secondary interventions for students at risk for behavior problems.

The Department seeks to fund another PBS center to continue to assist SEAs and LEAs with implementing, scaling up, and sustaining secondary interventions for students at-risk for developing behavioral problems and tertiary interventions for students with more serious behavioral problems.

Priority

The purpose of this priority is to fund a cooperative agreement to support the establishment and operation of a Center for Positive Behavioral Supports (Center) that will (1) assist SEAs and LEAs in developing the school and program components necessary to support the implementation, scaling up, and sustainability of school-wide and program-wide PBS at the school, program, LEA, and SEA levels and (2) identify and disseminate evidence-based practices on implementing, scaling up, and sustaining PBS, with a focus on secondary and tertiary level behavior interventions.

To be considered for funding under this absolute priority, applicants must meet the application requirements contained in this priority. The project funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

Application Requirements. An applicant must include in its application—

(a) A logic model that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project. A logic model communicates how a project will achieve its outcomes and provides a framework for both the formative and summative evaluations of the project;

Note: The following Web site provides more information on logic models and lists multiple online resources: *http://www.cdc.gov/eval/resources.htm.*

(b) A plan to implement the activities described in the *Project Activities* section of this priority;

(c) A plan, linked to the proposed project's logic model, for a formative evaluation of the proposed project's activities. The plan must describe how the formative evaluation will use clear performance objectives to ensure continuous improvement in the operation of the proposed project, including objective measures of progress in implementing the project and ensuring the quality of products and services;

(d) A budget for a summative evaluation to be conducted by an independent third party;

(e) A budget to support two full-time doctoral students to serve as project assistants during each year of the project period. The doctoral students' studies and research must have a concentration in special education, behavioral disorders, or a related area;

(f) A budget for attendance at the following:

(1) A one and one half day kick-off meeting to be held in Washington, DC within four weeks after receipt of the award, and at least two annual planning meetings held in Washington, DC with the OSEP Project Officer during the project period.

(2) A three-day Project Directors' Conference in Washington, DC during each year of the project period.

(3) A four-day Technical Assistance and Dissemination Conference in Washington, DC during each year of the project period.

(4) Two, two-day trips annually to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP; and

(g) A line item in the proposed budget for an annual set-aside of five percent of the grant amount to support emerging needs that are consistent with the proposed project's activities, as those needs are identified in consultation with OSEP.

Note: With approval from the OSEP Project Officer, the Center must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period.

Project Activities. To meet the requirements of this priority, the Center, at a minimum, must conduct the following activities:

Knowledge Development Activities

(a) Conduct an annual survey of SEAs to assess their capacity to support PBS at the State level and in schools, programs, and LEAs, and identify any policies and practices that facilitate or hinder implementing, scaling up, and sustaining PBS.

(b) Identify existing or develop new model demonstration sites implementing school-wide PBS with a focus on secondary interventions for students at risk for behavioral problems, and tertiary interventions for students with significant behavioral problems. The Center must evaluate these new model demonstrations at the individual school or program level, in a minimum of eight sites, which must include high schools and schools in urban areas. Through these model demonstrations, the Center must identify and describe the components of the models (e.g., training, and use of data) that lead to improved student outcomes, including academic achievement, and the sustainability of the model. The Center must analyze the information from these sites and incorporate the information as appropriate, into the evidence base for PBS.

(c) Review and synthesize the growing research and practice on PBS and prepare three state of knowledge papers on: Primary interventions, to be completed in the first year of the project period; secondary interventions, to be completed in the second year of the project period; and tertiary interventions, to be completed in the fourth year of the project period.

Technical Assistance and Dissemination Activities

(a) Provide TA to SEAs and LEAs to assist them in developing the components to support the implementation, scaling up, and sustainability of PBS at the school, program, LEA, and SEA levels. The Center must use the knowledge gained from the research syntheses and the model demonstrations to inform its TA.

(b) Develop and expand, as appropriate, an evaluation protocol that schools, programs, LEAs, and SEAs can use to evaluate their implementation of school-wide and program-wide PBS.

(c) Develop, maintain, and expand, as appropriate, an Internet-based database that schools, programs, LEAs, and SEAs can use to input and analyze data on behavioral measures, such as office discipline referrals, so that they can track their progress and make data-based decisions on their implementation of PBS. The Center must develop training materials for schools, programs, LEAs, and SEAs on how to use the database. The Center also must aggregate and analyze the data in the database to discern trends and patterns related to the implementation of PBS, as requested by OSEP.

(d) Develop and coordinate a national TA network comprised of a cadre of experts that the Center will use to provide TA to SEAs and LEAs to assist them in developing school and program components necessary to support PBS and in implementing, scaling-up, and sustaining PBS.

(e) Conduct national and regional meetings, including large-scale dissemination conferences on PBS, focused forums for those who train or coach school and program personnel on implementing PBS, topical symposia, and other meetings on related issues, as requested by OSEP. At a minimum, the Center must hold a national forum for those who train or coach school personnel on implementing, scaling up and sustaining PBS every year of the project period. The purpose of these meetings is to increase the knowledge and skills of State level PBS implementers through presentations on the critical components of PBS, and to provide networking opportunities and skill-building workshops related to training and coaching techniques.

(f) Develop partnerships with relevant local, State, and national organizations, such as teacher, school administrator, teacher trainer, and parent organizations, to increase their awareness and understanding of PBS so that they can support schools, programs, LEAS, and SEAs in implementing, scaling-up, and sustaining PBS.

(g) Maintain a Web site that meets a government or industry-recognized standard for accessibility and that links to the Web site operated by the Technical Assistance Coordination Center (TACC), which OSEP intends to fund in FY 2008.

(h) Prepare and disseminate products, reports, documents, and other materials on evidence-based practices and interventions that promote the implementation, scaling up, and sustainability of school-wide and program-wide PBS and related topics, as requested by OSEP, for specific audiences including families, educators, administrators, policymakers, and researchers. In consultation with the OSEP Project Officer, make selected reports, documents, products, and other materials publicly available in both English and Spanish.

(i) Develop materials and guidance for SEAs and provide targeted TA related to the performance and compliance indicator(s) on their IDEA Annual Performance Reports (APRs) and IDEA State Performance Plans (SPPs), as requested by OSEP.

Leadership and Coordination Activities

(a) Compile and share data on States' APRs and updated SPPs for IDEA Part B indicator 4 (Suspension and Expulsion) by—

(1) Reviewing relevant sections of each State's APR and updated SPP and summarizing the data on this indicator;

(2) Developing a summary report for this indicator that includes information about States' progress in meeting targets for the indicator, as well as any revisions made to States' monitoring and data systems, measurement systems, or improvement strategies; and

(3) Providing this summary report to OSEP in a timely manner and participating in OSEP-requested teleconferences to discuss the findings of the summary report.

Note: (For further information on Indicator 4, go to *http://www.rrfcnetwork.org/content/view/248/358/*).

(b) Communicate and collaborate, on an ongoing basis, with OSEP-funded projects, including the Center on State Implementation and Scaling-up of Evidence-based Practices, the Response to Intervention Center, the Progress Monitoring Center, the IDEA Partnership Project, the Regional Resource Centers, and the National Parent Technical Assistance Center. This collaboration could include the joint development of products, the coordination of TA services, and the planning and carrying out of TA meetings and events.

(c) Participate in, organize, or facilitate, as appropriate, OSEP communities of practice (*http://www.tacommunities.org/*) that are aligned with the Center's objectives as a way to support discussions and collaboration among key stakeholders.

(d) Prior to developing any new product, whether paper or electronic, submit to the OSEP Project Officer and the Proposed Product Advisory Board at OSEP's TACC for approval, a proposal describing the content and purpose of the product.

(e) Coordinate with the Dissemination Center, which OSEP intends to fund in FY 2008, to develop an efficient and high-quality dissemination strategy that reaches target audiences. The Center must report to the OSEP Project Officer the outcomes of these coordination efforts.

(f) Contribute, on an ongoing basis, updated information on the Center's services to OSEP's Technical Assistance and Dissemination Matrix (*http://matrix.rrfcnetwork.org/*), which provides current information on Department-funded TA services to a range of stakeholders.

(g) Maintain ongoing communication with the OSEP Project Officer through monthly phone conversations and e-mail communication.

Fourth and Fifth Years of the Project

In deciding whether to continue funding the Center for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a), and in addition—

(a) The recommendation of a review team consisting of experts selected by the Secretary. This review will be conducted during a one-day intensive meeting in Washington, DC that will be held during the last half of the second year of the project period. The Center must budget for travel expenses associated with this one-day intensive review;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the Center; and

(c) The quality, relevance, and usefulness of the Center's activities and products and the degree to which the Center's activities and products have contributed to changed practice and improved implementation of PBS.

References

Coie, J. D., & Dodge, K. A. (1983). Continuities and changes in children's social status: A five-year longitudinal study. *Merrill-Palmer Quarterly, 29,* 261–282.

Gresham, F. M. (2002). Teaching social skills to high risk children and youth: Preventive and remedial strategies. In M. Shinn, H. Walker, & G. Stoner (Eds.), *Interventions for academic and behavior problems II: Preventive and remedial strategies* (pp. 403–432). Bethesda, MD: National Association of School Psychologists.

Wagner, M., Cameto, R. (2004). *The Characteristics, Experiences, and Outcomes of Youth with Emotional Disturbances. A Report from the National Longitudinal Transition Study-2.* Volume 3, Issue 2. National Center on Secondary Education and Transition, University of Minnesota (NCSET). (ED484283)

Wagner, M., Cameto, R., & Newman, L. (2003). *Youth with disabilities: A changing population. A report of findings from the National Longitudinal Transition Study (NLTS) and the National Longitudinal Transition Study-2 (NLTS2).* Menlo Park, CA: SRI International.

Wagner, M., Newman, L., Cameto, R. (2005). *Changes over Time in the Secondary School Experiences of Students with Disabilities. A Report of Findings from the National Longitudinal Transition Study (NLTS) and the National Longitudinal Transition Study-2 (NLTS2).* Menlo Park, CA: SRI International.

Wagner, M., Newman, L., Cameto, R., & Levine, P. (2005). *Changes over time in the early postschool outcomes of youth with disabilities. A report of findings from the National Longitudinal Transition Study (NLTS) and the National Longitudinal Transition Study-2 (NLTS2).* Menlo Park, CA: SRI International.

Waiver of Proposed Rulemaking

Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1463 and 1481.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Cooperative agreements.

Estimated Available Funds: $1,700,000.

Estimated Average Size of Awards: $1,700,000.

Number of Awards: 1.

Maximum Awards: We will reject any application that proposes a budget exceeding $1,700,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs, including public charter schools that are considered LEAs under State law; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other: General Requirements*—(a) The projects funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants and award recipients funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the projects (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address To Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll-free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device

for the deaf (TDD), call, toll-free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA Number 84.326S.

Individuals with disabilities can obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Alternative Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 70 pages, using the following standards:

• A ''page'' is 8.5'' x 11'', on one side only, with 1'' margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

• Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. The page limit, however, does apply to the application narrative in Part III.

We will reject your application if you exceed the page limit or if you use other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: July 30, 2008.

Deadline for Transmittal of Applications: August 29, 2008.

Applications for grants under this competition may be submitted electronically using the Grants.gov Apply site (Grants.gov), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV.6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: September 8, 2008.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

To comply with the President's Management Agenda, we are participating as a partner in the Governmentwide Grants.gov Apply site. The Center on Positive Behavioral Supports competition, CFDA Number 84.326S, is included in this project. We request your participation in Grants.gov.

If you choose to submit your application electronically, you must use the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Center on Positive Behavioral Supports competition at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.326, not 84.326S).

Please note the following:

• Your participation in Grants.gov is voluntary.

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*

• To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) Registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D–U–N–S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.

• If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).

• If you submit your application electronically, you must attach any narrative sections of your application as files in a. DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.326S), 400 Maryland Avenue, SW., Washington, DC 20202–4260; or

By mail through a commercial carrier: U.S. Department of Education, Application Control Center, Stop 4260, *Attention:* (CFDA Number 84.326S), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.326S), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34

CFR 75.210 and are listed in the application package.

2. *Peer Review:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The Standing Panel requirements under IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within the specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notice (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities program. These measures focus on the extent to which projects provide high quality products and services, the relevance of project products and services to educational and early intervention policy and practice, and the use of products and services to improve educational and early intervention policy and practice.

Grantees also will be required to report information on their project's performance, including information related to the performance measures in this section, in annual reports to the Department (34 CFR 75.590).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Renee Bradley, U.S. Department of Education, 400 Maryland Avenue, SW., room 4103, Potomac Center Plaza (PCP), Washington, DC 20202–2550. *Telephone:* (202) 245–7277.

If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Alternative Format: Individuals with disabilities can obtain this document and a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: July 24, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8–17407 Filed 7–29–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Overview Information:

Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities—Center on Dispute Resolution; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2008.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.326D.

DATES:

Applications Available: July 30, 2008.

Deadline for Transmittal of Applications: August 29, 2008.

Deadline for Intergovernmental Review: September 8, 2008.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities program is to promote academic achievement and to improve results for children with disabilities by providing technical assistance (TA), supporting model demonstration projects, disseminating useful information, and implementing activities that are supported by scientifically based research.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute or otherwise authorized in the statute (see sections 663 and 681(d) of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*).

Absolute Priority: For FY 2008 and any subsequent year in which we make awards based on the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities—Center on Dispute Resolution.

Background

IDEA includes procedural safeguards that give parents an opportunity to file complaints about any matter relating to the provision of a free appropriate public education to an eligible child, including procedures that are designed to ensure the timely resolution of disputes so that a child's educational or early intervention program is not adversely affected. Currently, the procedural safeguards provide for the filing of State complaints, mediation, resolution sessions, and due process hearings.

State Complaints. The State complaint procedures under IDEA provide an easily and widely accessible method for parents and other interested individuals or organizations to voice concerns regarding alleged violations of IDEA to the State.

Mediation. In response to the growing number of due process hearing requests involving matters under IDEA, Congress amended IDEA in 1997 to require State educational agencies (SEAs) and Part C lead agencies to make mediation available, at a minimum, whenever a request for a due process hearing was made. The purpose of this requirement was to provide the parties involved in a dispute with an opportunity to resolve the dispute without a due process hearing. In 2004, Congress amended section 615(e) of IDEA to expand the use of mediation to allow parties to resolve disputes involving any matter under IDEA (not just those matters that are the subject of a due process complaint). Mediation provides a neutral third party to help facilitate the resolution of matters in dispute. Mediation is more likely than due process hearings to foster positive relationships between families and educators (U.S. Government Accountability Office, 2003).

Resolution Session. The 2004 amendments to IDEA added a new requirement for a resolution session prior to a due process hearing. Under section 615(f)(1)(B) of IDEA, the local educational agency (LEA) must convene a meeting with the parents and relevant member or members of the individualized education program (IEP) team who have specific knowledge of the facts identified in the complaint so that the parents and the LEA have an opportunity to resolve the complaint and avoid a due process hearing.

Due Process Hearings. Due process hearings provide the parties with an opportunity to have an impartial decision-maker resolve the issues in dispute. While due process hearings are an important protection, they can be costly if parties choose to involve attorneys in the process, time consuming, and contentious, and can damage relationships between families and educators. Therefore, the Department believes every effort should be made by the parties to resolve disputes as early as possible and without a due process hearing.

Data from State Performance Plans (SPPs) and Annual Performance Reports (APRs) submitted by States to the Office of Special Education Programs (OSEP) indicate that, although progress is being made, some States have not yet met their compliance targets for the timely resolution of State complaints and due process hearing requests. In addition, some States have not yet met their performance targets for the percentage of mediations and resolution meetings that result in agreement between the parties. Therefore, technical assistance and information on effective dispute resolution practices is needed in order for States to reach these targets (Consortium for Appropriate Dispute Resolution in Special Education, 2007). Additionally, States need technical assistance and information on how to effectively implement the requirements added by the 2004 amendments to IDEA for resolution sessions.

In addition to the methods of dispute resolution specifically required under IDEA (i.e., State complaint procedures, mediation, resolution sessions, and due process hearings), there are a variety of more informal or ''early resolution'' practices that can be used to resolve disputes at the school or district level. In the preamble to the final regulations implementing Part B of IDEA, the Department encouraged States to explore the use of early resolution practices to facilitate the timely resolution of disputes and to preserve the relationships between families and educators (71 FR 46540, 46604). Early resolution strategies offer parties additional opportunities to resolve disputes collaboratively and avoid time-consuming and costly litigation (U.S. Government Accountability Office, 2003). For example, training in conflict resolution, which is designed to equip individuals with skills to enhance their ability to communicate and negotiate their positions and interests, has been shown to result in early resolution of disputes (Henderson, 2008).

Since 1998, OSEP has funded a TA center to support States' implementation of dispute resolution processes. (For further information on the work of the current center, go to *www.directionservice.org/cadre*.) This center's grant is about to end. The Department believes it is important to continue to fund a TA center that provides SEAs and Part C lead agencies with resources that can help them in effectively implementing a range of dispute resolution options, including strategies that other SEAs and Part C lead agencies are using to address the SPP and APR indicators related to dispute resolution. SEAs and Part C lead agencies also need information on how to collect and use dispute resolution data to improve services and results for children with disabilities and their families. In addition, continued funding of a TA center on dispute resolution will help ensure that parents and families get the information they need about various methods for resolving disputes.

Priority

The purpose of this priority is to fund a cooperative agreement to support the establishment and operation of a Center on Dispute Resolution (Center) that will (1) provide TA to SEAs and Part C lead agencies on dispute resolution methods that can be used to resolve disputes in connection with the programs they implement under Part B and Part C of IDEA, and (2) collaborate with the National and Regional Technical Assistance Centers for Parent Centers funded by OSEP (Parent TACs) to provide information and resources to parents and families regarding strategies for resolving disagreements with SEAs and Part C lead agencies, utilizing a range of dispute resolution options.

The TA provided to SEAs and Part C lead agencies by the Center must address how to (1) implement a range of dispute resolution procedures, including those specifically required under IDEA (*i.e.*, State complaints, mediation, resolution sessions, and due process hearings) and techniques that facilitate early resolution of disputes; (2) collect, analyze, and report dispute resolution data to improve the State's system of general supervision and APR reporting; and (3) use dispute resolution data to improve services and results for children with disabilities and their families. The TA provided by the Center also must include targeted TA for SEAs and Part C lead agencies identified by OSEP that have not met the dispute resolution targets for the SPP indicators under IDEA and have been referred to the Center for assistance.

To be considered for funding under this absolute priority, applicants must meet the application requirements contained in this priority. The project funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

Application Requirements. An applicant must include in its application—

(a) A logic model that depicts, at a minimum, the goals, activities, outputs, and outcomes of the proposed project. A logic model communicates how a project will achieve its outcomes and provides a framework for both the formative and summative evaluations of the project;

Note: For more information on logic models, the following Web site lists multiple on-line resources: *http://www.cdc.gov/eval/resources.htm.*

(b) A plan to implement the activities described in the *Project Activities* section of this priority;

(c) A plan, linked to the proposed project's logic model, for a formative evaluation of the proposed project's activities. The plan must describe how the formative evaluation will use clear performance objectives to ensure continuous improvement in the operation of the proposed project, including objective measures of progress in implementing the project and ensuring the quality of products and services;

(d) A budget for a summative evaluation to be conducted by an independent third party;

(e) A budget for attendance at the following:

(1) A one and one-half day kick-off meeting to be held in Washington, DC within four weeks after receipt of the award, and a two day annual planning meeting held in Washington, DC with the OSEP Project Officer during each subsequent year of the project period.

(2) A three-day Project Directors' Conference in Washington, DC during each year of the project period.

(3) A four-day Technical Assistance and Dissemination Conference in Washington, DC during each year of the project period.

(4) A three-day OSEP Leadership Meeting during each year of the project period; and

(f) A line item in the proposed budget for an annual set-aside of five percent of the grant amount to support emerging needs that are consistent with the proposed project's activities, as those needs are identified in consultation with OSEP.

Note: With approval from the OSEP Project Officer, the Center must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period.

Project Activities. To meet the requirements of this priority, the Center, at a minimum, must conduct the following activities:

Knowledge Development Activities.

(a) Develop or update, as appropriate, research syntheses on the elements of effective approaches to dispute resolution and techniques to facilitate early resolution of disputes.

(b) Identify and document effective approaches to dispute resolution, including those dispute resolution methods required under IDEA (*i.e.*, State complaints, mediation, resolution sessions, and due process hearings) as well as other methods that have been shown to facilitate early resolution of disputes.

(c) In the first six months of the project period, identify a minimum of three States to partner with that have implemented effective dispute resolution systems for their Part B or Part C programs. The purpose of establishing a partnership with States is for the Center to acquire knowledge about how dispute resolution is working in the States and to use the information to inform the technical assistance and dissemination work of the Center. In partnering with States, the Center must work with both the Part C and Part B programs in each State. Factors for consideration in selecting the partner States could include whether (1) the State met its targets for the dispute resolution indicators in its SPP; (2) the State has a demonstrated history of using effective dispute resolution processes, including early resolution practices; and (3) the State offers professional development activities to local program staff that focus on timely and effective dispute resolution practices. Final State selection must be approved by OSEP.

Note: Applicants must describe in their application the proposed methods and criteria for recruiting and selecting partner States for the activities described in paragraph (c) of this section.

(d) In the first and second years of the project period, partner with the States identified in paragraph (c) of this section to (1) develop guidelines for implementing effective dispute resolution approaches and for monitoring and evaluating the implementation of these approaches and (2) identify, describe, and document the elements of the dispute resolution approaches that make them effective. The Center must build on the information learned from their work with partner States to develop exemplars and guidelines that all States can use to improve their dispute resolution processes, as appropriate.

(e) Collaborate with the Parent TACs to identify and document dispute resolution information needs of parents of children with disabilities and their families. The Center must collect data about the information parents and families need to fully participate in resolving disputes, including data that will inform the type of TA that the Center will offer in paragraph (e) of the *Technical Assistance and Dissemination Activities* section of this priority.

Technical Assistance and Dissemination Activities.

(a) Work directly with SEAs and Part C lead agencies using the exemplars and guidelines developed in the first and second years of the project to increase their capacity to effectively implement the range of dispute resolution options available, including early resolution practices. The Center must facilitate the development of State consortia, such as State-to-State information sharing systems, or regional TA networks to disseminate information on effective dispute resolution approaches in order to maximize the number of States the Center reaches. These activities must occur by at least the third year of the project period.

(b) In each year of the project period, utilize the current knowledge-base on dispute resolution to provide TA to SEAs and Part C lead agencies who are not successfully meeting their targets for the dispute resolution indicators in their SPPs by working collaboratively with States to—

(1) Evaluate the SEA or Part C lead agency's current dispute resolution system;

(2) Identify elements of the dispute resolution system that need improvement; and

(3) Develop an improvement plan and provide TA to implement the plan, as requested by OSEP.

(c) Develop materials and guidance for States to assist them in meeting the dispute resolution indicators on SPPs and APRs.

(d) Provide TA on collecting, analyzing, reporting, and using dispute resolution data to improve services and results for children with disabilities and their families (*i.e.*, analyzing and modifying, as appropriate, existing data management systems; providing guidance on how to collect timely and accurate data; offering strategies for reporting dispute resolution data to a variety of audiences; and utilizing the data to identify and address areas in need of improvement).

(e) Collaborate with the Parent TACs to provide TA and products to parents and families that will help them avoid and resolve disputes using the range of dispute resolution options available. Specific TA activities and products must address the needs identified in paragraph (e) of the *Knowledge Development Activities* section of this priority.

(f) Provide a continuum of general TA and disseminate widely information about effective dispute resolution practices to SEA personnel, Part C lead agency personnel, and Parent TACs using a variety of dissemination methods (e.g., managing listservs and communities of practice);

(g) Maintain a Web site that meets a government or industry-recognized standard for accessibility and that links to the Web site operated by the Technical Assistance Coordination Center (TACC), which OSEP intends to fund in FY 2008; and

(h) Prepare and disseminate reports, documents, and other materials on dispute resolution procedures, as requested by OSEP for specific audiences, including policy makers, service providers, local-level administrators, and parents and families. In consultation with the OSEP Project Officer and the advisory committee established in accordance with paragraph (c) in the *Leadership and Coordination Activities* section of this priority, make selected reports, documents, and other materials available for parents and families in both English and Spanish.

Leadership and Coordination Activities.

(a) Compile and share data related to dispute resolution from States' APRs and, as appropriate, SPPs, and specifically data from Part B indicators 16 (complaint timelines), 17 (due process hearing timelines), 18 (hearing requests resolved by resolution sessions), and 19 (mediation agreements) and Part C indicators 10 (complaint timelines), 11 (due process hearing timelines), 12 (hearing requests resolved by resolution sessions), and 13 (mediation agreements) by—

(1) Reviewing relevant sections of each State's APR and, as appropriate, SPP, and summarizing the data on these indicators;

(2) Developing a summary report for each indicator that includes information about States' progress in meeting targets for the indicator, as well as any revisions made to States' dispute resolution systems, or improvement strategies; and

(3) Providing a summary report for each indicator to OSEP in a timely manner and participating in OSEP-requested teleconferences to discuss the findings of the summary reports. (For further information on Part B performance and compliance indicators, go to *http://www.ed.gov/policy/speced/guid/idea/bapr/index.html.* For further information on Part C performance and compliance indicators, go to *http://www.ed.gov/policy/speced/guid/idea/capr/index.html.*)

(b) Collaborate with the OSEP-funded Data Accountability Center throughout the project period to acquire the data referenced in paragraph (a) of this section.

(c) Establish and maintain an advisory committee to review the activities and outcomes of the Center and provide programmatic support and advice throughout the project period. At a minimum, the advisory committee must meet through electronic means on an annual basis and consist of a family member or an individual with a disability who has received IDEA services; an individual with knowledge of cultural and linguistic diversity; a representative from an SEA; a representative from a Part C lead agency, or other appropriate public agency (*e.g.*, social services, public health, mental health); and persons with expertise in dispute resolution processes.

(d) Participate in, organize, or facilitate, as appropriate, OSEP communities of practice (*http://www.tacommunities.org/*) that are aligned with the Center's objectives as a way to support discussions and collaboration among key stakeholders.

(f) Prior to developing any new product, whether paper or electronic, submit to the OSEP Project Officer and the Proposed Product Advisory Board at OSEP's TACC for approval, a proposal describing the content and purpose of the product.

(g) Coordinate with the National Dissemination Center for Individuals with Disabilities, which OSEP intends to fund in FY 2008, to develop an efficient and high-quality dissemination strategy that reaches broad audiences. The Center must report to the OSEP Project Officer the outcomes of these coordination efforts.

(h) Contribute, on an ongoing basis, updated information on the Center's services to OSEP's Technical Assistance and Dissemination Matrix (*http://matrix.rrfcnetwork.org/*), which provides current information on Department-funded TA services to a range of stakeholders.

(i) Maintain ongoing communication with the OSEP Project Officer through monthly phone conversations, quarterly progress reports, and e-mail communication.

Fourth and Fifth Years of the Project

In deciding whether to continue funding the Center for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a), and in addition—

(a) The recommendation of a review team consisting of experts selected by the Secretary. This review will be conducted during a one-day intensive meeting in Washington, DC that will be held during the last half of the second year of the project period. The Center must budget for travel expenses associated with this one-day intensive review;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the Center; and

(c) The quality, relevance, and usefulness of the Center's activities and products and the degree to which the Center's activities and products have contributed to changed practice and improved processes for resolving disputes in special education and early intervention services.

References

Consortium for Appropriate Dispute Resolution in Special Education. (2007). *APR/SPP dispute resolution data summaries part B and part C: 2003–2006.* Eugene, OR: National Center on Dispute Resolution in Special Education.

Henderson, K. (2008, May). *Optional IDEA alternative dispute resolution.* Project Forum at the National Association of State Directors of Special Education (NASDSE) and Consortium for Appropriate Dispute Resolution in Special Education (CADRE). Retrieved June 5, 2008, from *http://www.projectforum.org/docs/OptionalIDEAAlternativeDisputeResolution.pdf.*

U.S. Government Accountability Office. (2003, September). *Special Education: Numbers of formal disputes are generally low and States are using mediation and other strategies to resolve conflicts.* (Publication No. GAO–03–897). Retrieved June 21, 2007, from GAO Reports: Main Page via GPO Access: *http://www.gpoaccess.gov/gaoreports/index.html.*

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1463 and 1481.

Applicable Regulations: The Education Department General

Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Cooperative Agreement.

Estimated Available Funds: $500,000.

Estimated Average Size of Awards: $500,000.

Maximum Awards: We will reject any application that proposes a budget exceeding $500,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs, including public charter schools that are considered LEAs under State law; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other: General Requirements*—(a) The projects funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants and grant recipients funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the projects (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address To Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. *Telephone, toll free:* 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, *toll free:* 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA Number 84.326D.

Individuals with disabilities can obtain a copy of the application package in an alternative format (*e.g.,* Braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Alternative Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 70 pages, using the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. The page limit, however, does apply to the application narrative in Part III.

We will reject your application if you exceed the page limit or if you use other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: July 30, 2008.

Deadline for Transmittal of Applications: August 29, 2008.

Applications for grants under this competition may be submitted electronically using the Grants.gov Apply site (Grants.gov), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: September 8, 2008.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this program may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

To comply with the President's Management Agenda, we are participating as a partner in the Governmentwide Grants.gov Apply site. The Center on Dispute Resolution competition, CFDA Number 84.326D, is included in this project. We request your participation in Grants.gov.

If you choose to submit your application electronically, you must use the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Center on Dispute Resolution competition at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.*, search for 84.326, not 84.326D).

Please note the following:

- Your participation in Grants.gov is voluntary.

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov;

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*

• To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3–Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.

• If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).

• If you submit your application electronically, you must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:
U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.326D) 400 Maryland Avenue, SW., Washington, DC 20202–4260.

or

By mail through a commercial carrier:
U.S. Department of Education, Application Control Center, Stop 4260, *Attention:* (CFDA Number 84.326D) 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.326D) 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Peer Review:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The Standing Panel requirements under IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within the specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notice (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html*.

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities program. These measures focus on the extent to which projects provide high quality products and services, the relevance of project products and services to educational and early intervention policy and practice, and the use of products and services to improve educational and early intervention policy and practice.

Grantees will be required to provide information related to these measures.

Grantees also will be required to report information on their project's performance in annual reports to the Department (34 CFR 75.590).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Tina Diamond, U.S. Department of Education, 400 Maryland Avenue, SW., room 4094, Potomac Center Plaza (PCP), Washington, DC 20202–2550. *Telephone:* (202) 245–6674.

If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Alternative Format: Individuals with disabilities can obtain this document and a copy of the application package in an alternative format (*e.g.,* Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. *Telephone:* (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–

888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *www.gpoaccess.gov/nara/index.html*.

Dated: July 24, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8–17408 Filed 7–29–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

DOE/Advanced Scientific Computing Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Advanced Scientific Computing Advisory Committee (ASCAC). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, August 5, 2008, 9 a.m. to 3:30 p.m.; Wednesday, August 6, 2008, 9 a.m. to 12 p.m.

ADDRESSES: Doubletree Hotel & Executive Meeting Center, Berkeley Marina, 200 Marina Boulevard, Berkeley, California, United States 94710.

FOR FURTHER INFORMATION CONTACT: Melea Baker, Office of Advanced Scientific Computing Research; SC–21/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue, SW.; Washington, DC 20585–1290; Telephone (301) 903–7486, (E-mail: *Melea.Baker@science.doe.gov*).

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance with respect to the advanced scientific computing research program.

Tentative Agenda: Agenda will include discussions of the following:

Tuesday, August 5, 2008

View from Washington and Germantown
Math for Analysis of Petascale Data
Report Discussion and Vote—Committee of Visitors on INCITE
ESnet Update
Report Discussion—ASCR Program Balance
Climate Computing Concept
Tour of Lawrence Berkeley National Laboratory
Tour open to all interested U.S. citizens via pre-registration
Public Comment

Wednesday, August 6, 2008

Report Discussion—Fusion Simulation Project
Report Discussion—Joint Panel on GTL Bios Issues
Public Comment

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda or participate in the tour, you should contact Melea Baker via FAX at 301–903–4846 or via e-mail (*Melea.Baker@science.doe.gov*). You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; 1E–190, Forrestal Building; 1000 Independence Avenue, SW.; Washington, DC 20585; between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC on July 24, 2008.

Rachel Samuel,

Deputy Committee, Management Officer.

[FR Doc. E8–17479 Filed 7–29–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2351–011]

Public Service Company of Colorado; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

July 23, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of license to delete certain non-jurisdictional transmission facilities from license.

b. *Project No.:* 2351–011.

c. *Date Filed:* June 17, 2008.

d. *Applicant:* Excel Energy Services, Inc. on behalf of Public Service Company of Colorado.

e. *Name of Project:* Cabin Creek Pumped Storage Hydroelectric Project.

f. *Location:* The project is located on the South Clear Creek and its tributary Cabin Creek in Clear Creek County, Colorado.

g. *Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Randy Rhodes, Excel Energy, 4653 Table Mountain Drive, Golden, Colorado 80403. Tel.: (720) 497–2123.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Vedula Sarma at (202) 502–6190, or e-mail address: *vedula.sarma@ferc.gov*.

j. *Deadline for filing comments and/or motions:* August 25, 2008.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and instructions on the Commission's Web site under the ''e-filing'' link. The Commission strongly encourages electronic filings. Please include the project number P–2351–011 on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Excel Energy on behalf of Public Service Company of Colorado proposes to delete from license a 31-mile-long double-circuit 230-kV transmission line extending from Cabin Creek to the Lookout Substation. According to the licensee the line is no longer a primary line for the project, but it is an integral part of the Public Service Co's interconnected transmission system in Colorado.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–17401 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP08–443–000]

Williston Basin Interstate Pipeline Company; Notice of Application

July 23, 2008.

Take notice that on July 21, 2008, Williston Basin Interstate Pipeline Company (Williston Basin), P.O. Box 5601, Bismarck North Dakota 58506–5601, filed in Docket Number CP08–443–000, pursuant to section 7(c) of the Natural Gas Act (NGA), an application for authority to lease certain gas volumes for use as cushion gas in its Elk Basin Storage Reservoir located in Park County, Wyoming and Carbon County, Montana. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions regarding this Application should be directed to Keith A. Tiggelaar, Director of Regulatory Affairs for Williston Basin, 1250 West Century Avenue, Bismarck, North Dakota 58503, by phone at (701) 530–1560 or by e-mail at *keith.tiggelaar@wbip.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the

Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the Internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: August 13, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–17396 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

July 24, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP08–371–001.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission, LLC submits Original Sheet 74B of its FERC Gas Tariff, Second Revised Volume 1 effective 7/1/08.

Filed Date: 07/23/2008.

Accession Number: 20080723–0239.

Comment Date: 5 p.m. Eastern Time on Monday, August 04, 2008.

Docket Numbers: RP08–452–000.

Applicants: Northwest Pipeline GP.

Description: Northwest Pipeline, GP request that the Commission grant a waiver of Section 25.2(c) of the General Terms and Conditions of FERC Gas Tariff, etc.

Filed Date: 07/23/2008.

Accession Number: 20080724–0021.

Comment Date: 5 p.m. Eastern Time on Monday, August 04, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–17434 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–207–000]

Transcontinental Gas Pipe Line Corporation; Notice of Intent To Prepare an Environmental Assessment for the Proposed Hester Storage Field Retirement Project and Request for Comments on Environmental Issues

July 23, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of Transcontinental Gas Pipe Line Corporation's (Transco) Hester Storage Field Retirement Project (Project) involving abandonment, construction, and temporary operation of facilities by Transco in St. James Parish, Louisiana.

This notice announces the opening of the scoping process we will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine which issues need to be evaluated in the EA. Please note that the scoping period will close on August 22, 2008.

This notice is being sent to affected landowners; federal, state, and local government representatives and agencies; environmental and public interest groups; Native American tribes; other interested parties in this proceeding; and local libraries and newspapers. We encourage government representatives to notify their constituents of this planned project and encourage them to comment on their areas of concern.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' was attached to the project notice Transco provided to landowners. This fact sheet addresses a number of typically asked questions, including how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site *(http://www.ferc.gov).*

Summary of the Proposed Project

The proposed project would involve temporary compression and minor modification and installation of yard pipeline at Compressor Station 64 to support the final withdrawal of base gas from the Hester Storage field; eventual removal and capping of 5 wells of the Hester Storage Field; closure of Compressor Station 64, and the abandonment in place of 4.75 miles of pipeline lateral.

Specifically, Transco proposes to:

- Temporarily install one 630 horsepower engine/compressor unit associated yard pipes at Compressor Station 64;
- Remove gathering lines between Compressor Station 64 and 5 injection/withdrawal wells, 1 monitoring well, and 3 water wells;
- Abandon the 12-inch pipeline lateral from Compressor station 64 (milepost 8.66) to the interconnect with Occidental Chemical Corporation (milepost 3.91);
- Abandon and cap 5 injection/withdrawal wells, 1 monitoring well, and 3 water wells; and

• Remove all aboveground buildings and equipment at Compressor Station 64, including, but not limited to the compressor building, office/shop, air compressor building, utility shed, meter building, condensate and wastewater tanks, gas coolers, glycol units, gas scrubbers, 2 existing engine/compressor units, and associated piping.

The location of the project facilities is shown in Appendix 1.[1]

Nonjurisdictional Facilities

There are no non-jurisdictional facilities associated with this project.

Land Requirements for Construction

Construction of the proposed temporary facilities would be contained within the existing Compressor Station 64 fence line, existing well pads and existing pipeline right-of-way. Approximately 14.06 acres of land would be disturbed during the temporary installation of compression and the abandonment of wells and pipeline. Following construction, the use of the pipeline lateral right-of-way would revert to the landowner while the compressor station property would either be donated to the community or sold.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices, other than Appendix 1 (maps), are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

In the EA we[2] will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

• Geology and soils.
• Land use.
• Water resources, fisheries, and wetlands.
• Cultural resources.
• Vegetation and wildlife.
• Air quality and noise.
• Endangered and threatened species.
• Hazardous waste.
• Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

Currently Identified Environmental Issues

We have already identified issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Transco. This preliminary list of issues may be changed based on your comments and our analysis.

• The project may have air emissions and noise impacts.
• Safety of the storage field after abandonment.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Hester Storage Field Abandonment Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before August 22, 2008.

[2] ''We'', ''us'', and ''our'' refer to the environmental staff of the Office of Energy Projects (OEP).

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number CP08–207–000 with your submission. The docket number can be found on the front of this notice. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov*.

(1) You may file your comments electronically by using the Quick Comment feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to Documents and Filings. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''Sign up'' or ''eRegister.'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing;'' or

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426.

Label one copy of the comments for the attention of Gas Branch 3, PJ11.3.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners whose property may be used temporarily for project purposes, who have existing easements from the pipeline, or who own homes within distances defined in the Commission's regulations of certain aboveground facilities. By this notice we are also asking governmental agencies, especially those in Appendix 2, to express their interest in becoming cooperating agencies for the preparation of the EA.

If you do not want to send comments at this time but still want to remain on our mailing list, please return the Information Request (Appendix 3). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor.'' Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding.

If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214). Only intervenors have the right to seek rehearing of the Commission's decision.

The Notice of Application for this proposed project issued on May 6, 2008 identified the date for the filing of interventions as May 28, 2008. However, affected landowners and parties with environmental concerns may be granted late intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Availability of Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–17404 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF08–2011–000]

Bonneville Power Administration; Notice of Filing

July 23, 2008.

Take notice that on July 14, 2008, the Bonneville Power Administration (BPA) filed its proposed Average system Cost Methodology (2008 ASCM) for the Commission's review and approval on an interim basis, effective October 1, 2008, vested in the Commission by Pacific Northwest Electric Power Planning and Conservation Act, under section 5(c)(7), and Commission regulations, 16 U.S.C. section 839c(c)(7).

BPA also requests the Commission to revise its regulations at 18 CFR section 301.1 to reflect BPA's 2008 ASCM once it is approved.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 13, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–17397 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF08–2021–000]

Bonneville Power Administration; Notice of Filing

July 23, 2008.

Take notice that on July 17, 2008, Bonneville Power Administration, filed its 2009 Wind Integration—Within-Hour Balancing Service rate schedule for the Commission's confirmation and approval on an interim basis by September 30, 2008 and final approval effective October 1, 2008 through September 30, 2008, vested in the Commission by Pacific Northwest Electric Power Planning and Conservation Act, under sections 7(a)(2) and 7(i)(6), and Commission regulations, 16 U.S.C. 839e(a)(2) and 839e(i)(6), and Subpart B of Part 300, 18 CFR part 300.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 18, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–17398 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL03–77–007; Docket No. RP03–311–005]

Enron Power Marketing, Inc. and Enron Energy Services, Inc.; Bridgeline Gas Marketing L.L.C., Citrus Trading Corporation, ENA Upstream Company, LLC, Enron Canada Corp., Enron Compression Services Company, Enron Energy Services, Inc., Enron MW, L.L.C., and Enron North America Corp; Notice of Filing

July 23, 2008.

Take notice that on July 21, 2008, Enron Power Marketing, Inc., Enron Energy Services, Inc., ENA Upstream Company, LLC, Enron Canada Corp., Enron Compression Services, Enron MW, L.L.C. and Enron North America Corp., and the City of Seattle filed a uncontested offer of settlement that is intended to resolve all issues in the above-captioned proceeding as well as certain petitions for review currently pending before the United States Court of Appeals for the District of Columbia Circuit.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 11, 2008.

Reply Comment Date: 5 p.m. Eastern Time on August 20, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–17399 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR08–13–002]

Houston Pipe Line Company, L.P.; Notice of Compliance Filing

July 23, 2008.

Take notice that on July 10, 2008, Houston Pipe Line Company, L.P. filed a Statement of Operating Conditions pursuant to section 284.123(e) of the Commission's regulations and to comply with the Commission's letter order issued on June 18, 2008, in Docket Nos. PR08–13–000 and PR08–13–001.

Any person desiring to participate in this proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 5, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–17402 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR08–13–003]

Houston Pipe Line Company, L.P.; Notice of Compliance Filing

July 23, 2008.

Take notice that on July 15, 2008, Houston Pipe Line Company, L.P. filed a Report of Refunds in compliance with the Commission's letter order issued on June 18, 2008, in Docket Nos. PR08–13–000 and PR08–13–001.

Any person desiring to participate in this proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 5, 2008.

Kimberly D. Bose,
Secretary.
[FR Doc. E8–17403 Filed 7–29–08; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TX02–1–002]

Pinnacle West Capital Corp.; Notice of Filing

July 23, 2008.

Take notice that on July 15, 2008, Electrical District No. 3 of the County of Pinal, State of Arizona (ED3), filed a change to the rate contained in Exhibit D of the Transmission Service Agreement between ED3 and Arizona Public Service Co., assignee of Pinnacle West Capital Corporation, from a stated rate of 15 mills per kWh to the formula rate explained in the accompanying testimony of Jeffrey J. Woner (Exhibit ED3–1) and specifically set forth as Exhibits ED3–2 (rate template) and ED3–3 (Protocols).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 5, 2008.

Kimberly D. Bose,
Secretary.
[FR Doc. E8–17395 Filed 7–29–08; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12749–000]

Oregon Wave Energy Partners I, LLC; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

July 23, 2008.

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 12749–000.

c. *Date Filed:* March 7, 2008.

d. *Submitted By:* Oregon Wave Energy Partners I, LLC.

e. *Name of Project:* Coos Bay OPT Wave Park.

f. *Location:* Oregon state territorial waters of the Pacific Ocean, about 3 miles off the coast near Coos Bay, in Coos County, Oregon. A portion of the proposed terrestrial power cable would be buried and pass through United States lands administered by the Bureau of Land Management.

g. *Filed Pursuant to:* 18 CFR 5.5 and 5.6 of the Commission's regulations.

h. License Applicant Contact: Mr. Charles F. Dunleavy, 1590 Reed Road, Pennington, NJ 08534; (609) 730–0400; or e-mail at *edunleavy@oceanpowertech.com.*

i. *FERC Contact:* Jim Hastreiter at (503) 552–2760; or e-mail at: *james.hastreiter@ferc.gov.*

j. Pursuant to 18 CFR 5.3(a)(2), Oregon Wave Energy Partners I, LLC filed a request to use the Traditional Licensing Process on March 7, 2008, and provided public notice of this request on March 8, 2008. With this notice, the Director of the Office of Energy Projects approves Oregon Wave Energy Partners I, LLC's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the

Endangered Species Act and the joint agency consultation thereunder at 50 CFR part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920; and (c) the Oregon State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Oregon Wave Energy Partners I, LLC, as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act, section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, and section 106 of the National Historic Preservation Act

m. Oregon Wave Energy Partners I, LLC filed a Pre-Application Document (PAD) with the Commission pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at *http://ferc.gov/esubscribenow.htm* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–17400 Filed 7–29–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0524; FRL–8373–4]

Calcium Hydroxide; Receipt of Application for Emergency Exemption Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a quarantine exemption request from the Hawaii Department of Agriculture to use the pesticide calcium hydroxide (CAS No. 1305–62–0) to treat up to 4,000 acres of outdoor plants in nurseries, residential areas, parks, hotels and resorts, forest habitats, and natural areas to control Coqui and Greenhouse frogs. The applicant proposes the use of a new chemical which has not been registered by EPA. This is the second request by the State of Hawaii.

EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before August 13, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0524, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0524. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Stacey Groce, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–2505; fax number: (703) 605–0781; e-mail address: *groce.stacey@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The Hawaii Department of Agriculture has requested the Administrator to issue a quarantine exemption for the use of calcium hydroxide on outdoor plants in nurseries and residential areas, parks, hotels and resorts, forest habitats, and natural areas to control Coqui and Greenhouse frogs. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the Hawaii Department of Agriculture asserts that it is necessary to control the Coqui and Greenhouse frogs (*Eleutherodactylus coqui* and *E. planirostris*) in areas of Hawaii where they have accidentally been introduced via infected nursery plants. These tropical frogs are not native to Hawaii, but come from the Caribbean, although one or both species is established on the continental United States in Florida, Louisiana, and Alabama. There is great concern that the frogs have the potential to cause serious damage to the native Hawaiian forest ecosystems, including endangered and threatened species. *E. Coqui* is now firmly established on Maui and the island of Hawaii with smaller populations on Kaui and Oahu. *E. planirostris* is also found on Kaui, Oahu, Maui, and the island of Hawaii. The sites where they are established include commercial plant nurseries, residential areas, resorts, hotels, parks, forest habitats and natural areas. These species are spread to additional sites primarily through the transportation of infested plant materials to uninfested sites.

The applicant asserts that these frogs pose a serious threat to both agriculture and to the native Hawaiian forest ecosystems, including many endangered species. In particular, *Eleutherodactylus* frogs have the potential to be a serious threat to native endangered bird species. The *E. cocqi* may exert predation pressure on a wide variety of native anthropods, many of which are already stressed due to the establishment of other alien predators and parasitoids. Additionally, these frog species will compete for insect food sources with the native birds, the majority of which are partially or completely insectivorous. The Hawaiian hoary bat and many anthropod species also depend upon insects and spiders as a food source, According to the quarantine exemption application, another concern is that the rapid increase in populations of these frog species could provide a food source for and enhance the already large populations of introduced predators, such as rats and mongooses.

In 2005, EPA granted the Hawaii Department of Agriculture a quarantine exemption for use of calcium hydroxide to control the *Eleutherodactylus* frogs. This quarantine exemption program expired on April 26, 2008.

In this request, the applicant's projected acreage for 2008-2010 is 4,000 acres on outdoor plant nurseries, residential areas, resorts and hotels, parks, forest habitats, and natural areas throughout the entire state of Hawaii. According to the current request, use of calcium hydroxide is proposed for application as follows:

1. As dust application (to soil surface only) at a maximum rate of 500 lbs. of product per acre (485 lbs. a.i. per acre);

2. In combination with water as soil drench with application equipment at a maximum rate of 950 lbs. of product per acre (921.5 lbs. a.i. per acre); or

3. In combination with water as foliar application with ground equipment at a maximum rate of 500 lbs. of product per acre (485 lbs. a.i. per acre). A maximum of twelve applications may be made per year. Therefore, a total maximum of 136,800,000 lbs. of product or 132,696,000 lbs. a.i of calcium hydroxide could be applied to treated areas under this request.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA require publication of a notice of receipt of an application for a quarantine exemption proposing use of calcium hydroxide, which has not been registered by EPA.

An analogous exemption program intended to control introduced frogs in Hawaii involving calcium hydroxide recently expired and drew public interest. The notice provides an opportunity for public comment on this proposed application.

The Agency, will review and consider all comments received during the comment period in determining whether to issue the quarantine exemption requested by the Hawaii Department of Agriculture.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: July 15, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E8–17236 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2007–0068; FRL–8699–1]

RIN 2040–AE60

Drinking Water: Regulatory Determinations Regarding Contaminants on the Second Drinking Water Contaminant Candidate List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Safe Drinking Water Act (SDWA), as amended in 1996, requires the United States Environmental Protection Agency (EPA) to periodically publish a list of unregulated contaminants (known as the Contaminant Candidate List or CCL) and determine whether to regulate at least five contaminants on each list. Today's action announces the Agency's final determinations on whether to issue national primary drinking water regulations (NPDWRs) for 11 contaminants listed on the second Contaminant Candidate List (CCL 2).

On May 1, 2007, EPA published preliminary regulatory determinations for 11 of the 51 contaminants listed on CCL 2 and requested public comment on the determinations, process, rationale, and supporting technical information for each contaminant. The 11 regulatory determination contaminants are boron; the dacthal mono- and di-acid degradates; 1,1-dichloro-2,2-bis(p-chlorophenyl)ethylene (DDE); 1,3-dichloropropene; 2,4-dinitrotoluene; 2,6-dinitrotoluene; s-ethyl dipropylthiocarbamate (EPTC); fonofos; terbacil; and 1,1,2,2-tetrachloroethane. In the May 2007 notice, the Agency made a preliminary determination that no regulatory action was appropriate for any of these 11 contaminants.

EPA received comments from nine individuals or organizations on the preliminary regulatory determinations for the 11 contaminants and additional comments for other contaminants on CCL 2: perchlorate, methyl tertiary butyl ether (MTBE), metolachlor, and cyanotoxins. After careful review and consideration of these comments, the Agency is making a final determination that no regulatory action is appropriate at this time for any of the 11 CCL 2 contaminants for which the Agency made preliminary regulatory determinations in the May 2007 notice.

DATES: For purposes of judicial review, the regulatory determinations in this notice are issued as of July 30, 2008, as provided in 40 CFR 23.7.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2007–0068. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Yvette Selby-Mohamadu, Standards and Risk Management Division, Office of Ground Water and Drinking Water, 4607M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* (202) 564–5245; *e-mail address: selby-mohamadu.yvette@epa.gov*. For general information contact the EPA Safe Drinking Water Hotline at (800) 426–4791, or (703) 412–3330, from 10 a.m. to 4 p.m., Eastern Time, Monday through Friday, excluding legal holidays.

Abbreviations and Acronyms

μg/L—micrograms per liter
ATSDR—Agency for Toxic Substances and Disease Registry
AwwaRF—American Water Works Association Research Foundation
CCL—Contaminant Candidate List
CCL 1—EPA's First Contaminant Candidate List
CCL 2—EPA's Second Contaminant Candidate List
1,3-DCP—1,3-dichloropropene
DCPA—dimethyl tetrachloroterephthalate (dacthal)
DDE—1,1-dichloro-2,2-bis(p-chlorophenyl)ethylene
DDT—1,1,1-trichloro-2,2-bis(p-chlorophenyl)ethane
DNT—dinitrotoluene
EPA—United States Environmental Protection Agency
EPTC—s-ethyl dipropylthiocarbamate
ESA—ethane sulfonic acid
FR—**Federal Register**
HRL—health reference level
IRIS—Integrated Risk Information System
kg—kilogram
L—liter
MAC—*Mycobacterium avium*
MCL—maximum contaminant level
MCLG—maximum contaminant level goal
MRL—minimum or method reporting limit (depending on the study or survey cited)
MTBE—methyl tertiary butyl ether
MTP—monomethyl-2,3,5,6-tetrachloroterephthalate
NDWAC—National Drinking Water Advisory Council
NIRS—National Inorganic and Radionuclide Survey
NRC—National Research Council
NPDWR—national primary drinking water regulation
OA—oxanilic acid
OPP—Office of Pesticide Programs
PWS—public water system
RSC—relative source contribution
SDWA—Safe Drinking Water Act
SOT—Society of Toxicology
TPA—2,3,5,6-tetrachchloroterephthalic acid
TRI—Toxics Release Inventory
TT—treatment technique
UCM—Unregulated Contaminant Monitoring
UCMR 1—First Unregulated Contaminant Monitoring Regulation issued after the 1996 SDWA Amendments
US—United States of America
USGS—United States Geological Survey

SUPPLEMENTARY INFORMATION:

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Impose Any Requirements on My Public Water System?

None of these regulatory determinations will impose any requirements on anyone. Instead, this action notifies interested parties of EPA's determinations for 11 CCL 2 contaminants and provides a summary of the major comments received on the May 1, 2007, preliminary determinations (72 FR 24016 (USEPA, 2007a)).

II. Purpose, Background and Summary of This Action

A. What Is the Purpose of This Action?

Today's action briefly describes the statutory requirements for targeting potential drinking water contaminants for regulatory development and the approach EPA used to make regulatory determinations for 11 CCL 2 contaminants. In addition, today's action (1) summarizes the public comments received on EPA's preliminary determinations and the Agency's responses to those comments, (2) presents the Agency's findings and final regulatory determination for 11 CCL 2 contaminants, and (3) provides information regarding the other CCL 2 contaminants.

B. What Is the Statutory Requirement for the Contaminant Candidate List (CCL) and Regulatory Determinations?

The specific statutory requirements for the CCL and regulatory determinations can be found in SDWA section 1412(b)(1). The 1996 SDWA Amendments require EPA to publish the CCL every five years. The CCL is a list of contaminants that are not subject to any proposed or promulgated national primary drinking water regulations (NPDWRs), are known or anticipated to occur in public water systems (PWSs), and may require regulation under SDWA. The 1996 SDWA Amendments also direct EPA to determine whether to regulate at least five contaminants from the CCL every five years. SDWA requires EPA to publish a Maximum Contaminant Level Goal [1] (MCLG) and promulgate an NPDWR [2] for a contaminant if the Administrator determines that:

(a) The contaminant may have an adverse effect on the health of persons;

(b) The contaminant is known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and

(c) In the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.

If EPA determines that all three of these statutory criteria are met, it makes a determination that a national primary drinking water regulation is needed. In that case, the Agency has 24 months to publish a proposed MCLG and NPDWR. After the proposal, the Agency has 18 months to publish a final MCLG and promulgate a final NPDWR (SDWA section 1412(b)(1)(E)).[3]

C. What Contaminants Did EPA Consider for Regulation?

On May 1, 2007 (72 FR 24016 (USEPA, 2007a)), EPA published preliminary regulatory determinations for 11 CCL 2 contaminants that have sufficient information to support a regulatory determination. The 11 contaminants are boron; the dacthal mono- and di-acid degradates; 1,1-dichloro-2,2-bis(p-chlorophenyl)ethylene (DDE); 1,3-dichloropropene; 2,4-dinitrotoluene (DNT); 2,6-dinitrotoluene; s-ethyl dipropylthiocarbamate (EPTC); fonofos; terbacil; and 1,1,2,2-tetrachloroethane.

Information for the 11 contaminants is available in the regulatory determination support document (USEPA, 2008a), the occurrence technical support documents (USEPA, 2008b–c), and the Health Effects Support Documents or Drinking Water Advisories for each of the contaminants (USEPA, 2008d–l). This information is available at the Water Docket (Docket ID No. EPA–HQ–OW–2007–0068) and is also available on EPA's Safe Drinking Water Regulatory Determination Web site at *http://www.epa.gov/safewater/ccl/reg_determine2.html.* Brief descriptions of each of the 11 contaminants considered for regulatory determinations are included in section V of this notice.

III. What Approach and Analyses Did EPA Use To Make the Regulatory Determinations?

A. Approach

In identifying which CCL 2 contaminants are candidates for regulatory determinations, the Agency considered whether sufficient information and/or data were available to characterize the potential health effects and the known/likely occurrence in and exposure from drinking water. For health effects, the Agency considered whether an Agency-approved health risk assessment [4] was available to identify any potential adverse health effect(s) and derive an estimated level at which no adverse health effect(s) are likely to occur. For occurrence, the Agency considered whether available information/data provided a representative picture of known and/or likely occurrence in public water systems. If sufficient information/data were available to characterize adverse human health effects and known/likely occurrence in public water systems, the Agency identified the contaminant as a potential candidate for regulatory determinations. In addition to information/data for health and occurrence, EPA also considered the availability and adequacy of analytical methods (for monitoring) and treatment.

In cases where EPA chose a contaminant as a candidate for regulatory determination, the Agency considered the following in evaluating each of the three statutory criteria.

(a) First statutory criterion—Is the contaminant likely to cause an adverse effect on the health of persons? The Agency evaluated the best available, peer-reviewed assessments and studies to characterize the human health effects that may result from exposure to the contaminant when found in drinking water. Based on this characterization, the Agency estimated a health reference level (HRL) for each contaminant.

[1] The MCLG is the ''maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety. Maximum contaminant level goals are nonenforceable health goals'' (40 CFR 141.2).

[2] An NPDWR is a legally enforceable standard that applies to public water systems. An NPDWR sets a legal limit (called a maximum contaminant level or MCL) or specifies a certain treatment technique (TT) for public water systems for a specific contaminant or group of contaminants.

[3] The statute authorizes a nine month extension of this promulgation date.

[4] Health information used for the regulatory determinations process includes but is not limited to health assessments available from the Agency's Integrated Risk Information System (IRIS), the Agency's Office of Pesticide Programs (OPP) in a Reregistration Eligibility Decision (RED), the National Academy of Sciences (NAS), and/or the Agency for Toxic Substances and Disease Registry (ATSDR).

(b) Second statutory criterion—Is the contaminant known or likely to occur in public water systems at a frequency and level of public health concern? To evaluate known occurrence in PWSs, the Agency compiled, screened, and analyzed data from several occurrence data sets to develop representative occurrence estimates for public drinking water systems. EPA used the HRL estimate for each contaminant as a benchmark against which to conduct an initial evaluation or screening of the occurrence data. For each contaminant, EPA estimated the number of PWSs (and the population served by these PWSs) with detections greater than one-half the HRL (> ½ HRL) and greater than the HRL (> HRL). To further evaluate the likelihood of a contaminant occurring in drinking water, the Agency considered information on the use and release of the contaminant into the environment and supplemental information on occurrence in water (e.g., ambient water quality data, State ambient or finished water data, and/or special studies performed by other agencies, organizations and/or entities).

(c) Third statutory criterion—In the sole judgment of the Administrator, does regulation of the contaminant present a meaningful opportunity for health risk reduction for persons served by public water systems? EPA evaluated the potential health effects and the results of the occurrence estimates, as well as exposure estimates (i.e., the population exposed and the sources of exposure) at the health level of concern to determine if regulation presents a meaningful opportunity for health risk reduction.

If the answers to all three statutory criteria are affirmative for a particular contaminant, then the Agency makes a determination that regulation is necessary and proceeds to develop an MCLG and a national primary drinking water regulation for that contaminant. It should be noted that this regulatory determination process is distinct from the more detailed analyses needed to develop a national primary drinking water regulation. Thus, a decision to regulate is the beginning of the Agency's regulatory development process, not the end.

If the answer to any of the three statutory criteria is negative based on the available data, then the Agency makes a determination that a national primary drinking water regulation is not necessary for that contaminant at that time.

B. Analyses

EPA has prepared Health Effects Support Documents or Drinking Water Advisories (USEPA, 2008d–l) for each of the 11 contaminants. In these documents, EPA characterized the human health effects that may result from exposure to a contaminant found in drinking water. The support documents address exposure from drinking water and other media, toxicokinetics, hazard identification, dose-response assessment, and an overall characterization of risk from drinking water. Based on this characterization, EPA estimated a health reference level (HRL) or benchmark value for each contaminant.

To analyze occurrence and exposure, the Agency used data from the first Unregulated Contaminant Monitoring Regulation (UCMR 1) for 9 of the contaminants: The dacthal mono- and di-acid degradates, 1,1-dichloro-2,2-bis(p-chlorophenyl)ethylene (DDE), 1,3-dichloropropene, 2,4-dinitrotoluene, 2,6-dinitrotoluene, s-ethyl dipropylthiocarbamate (EPTC), fonofos, and terbacil.[5] In addition, the Unregulated Contaminant Monitoring (UCM[6]) program provided additional data for 1,3-dichloropropene and 1,1,2,2-tetrachloroethane and the National Inorganic and Radionuclide Survey (NIRS[7]) provided data for boron. The Agency used the UCMR 1, UCM, and NIRS data to estimate the number and percentage of PWSs and the population served by these PWSs at concentrations above the HRL benchmark values, and ½ the HRL values. The Agency also used these data to evaluate the geographic distribution of occurrence for these 11 CCL 2 contaminants.

EPA also employed State drinking water data, use and environmental release information (e.g., EPA's Toxic Release Inventory (TRI), academic and private sector publications), as well as ambient water quality data (e.g., data from the U.S. Geological Survey's National Water Quality Assessment program) as secondary sources of information to evaluate the likelihood of contaminant occurrence.

A detailed discussion of the data collected and analyses for each contaminant can be found in the regulatory determination support document (USEPA, 2008a) and the occurrence technical support documents (USEPA, 2008b–c). In addition, a summary of the occurrence and exposure findings are included in Table 1. Table 1 in this notice is similar to Table 3 in the May 2007 notice (72 FR 24016 (USEPA, 2007a)); however, note that EPA updated the occurrence data for the UCMR 1 results to include final results for 17 additional drinking water systems that were not available when the Agency was in the process of making its preliminary regulatory determinations. Updating these numbers did not change the outcome of today's decisions.

TABLE 1—SUMMARY OF THE HEALTH AND OCCURRENCE INFORMATION AND THE FINAL DETERMINATIONS FOR THE 11 CONTAMINANTS CONSIDERED UNDER CCL REGULATORY DETERMINATIONS 2

#	Contaminant and its chemical abstract registry number (CASRN)	Determination	Health reference level (HRL)	Occurrence findings from primary data sources (UCMR 1, UCM round 1 and 2 cross sections, NIRS)				
				Database	PWSs with at least 1 detection > ½ HRL	Population served by PWSs with at least 1 detection > ½ HRL	PWSs with at least 1 detection > HRL	Population served by PWSs with at least 1 detection > HRL
1	Boron (7440–42–8)	Do not regulate[1].	1,400 µg/L.	NIRS	4.3% (43 of 989)	2.9% (42.7K of 1.48M).	1.7% or (17 of 989)[1].	0.4% (6.4K of 1.48M)
2	Dacthal di acid degradate[2] (2136–79–0).	Do not regulate.	70 µg/L[4]	UCMR 1[5]	0.05% (2 of 3,876)	0.33% (739K of 225M).	0.03% (1 of 3,876)	<0.01% (500 of 225M)

[5] The UCMR 1 monitoring survey began in 2001. As discussed in the May 2007 notice, fonofos was sampled as part of UCMR 1 Screening Monitoring and the remaining 8 contaminants were sampled as part of UCMR 1 Assessment Monitoring.

[6] EPA implemented the UCM program in two phases or rounds. The first round of UCM monitoring generally extended from 1988 to 1992 and is referred to as UCM Round 1 monitoring. The second round of UCM monitoring generally extended from 1993 to 1997 and is referred to as UCM Round 2 monitoring.

[7] The monitoring for NIRS spanned from 1984 to 1986.

TABLE 1—SUMMARY OF THE HEALTH AND OCCURRENCE INFORMATION AND THE FINAL DETERMINATIONS FOR THE 11 CONTAMINANTS CONSIDERED UNDER CCL REGULATORY DETERMINATIONS 2—Continued

#	Contaminant and its chemical abstract registry number (CASRN)	Deter-mination	Health reference level (HRL)	Occurrence findings from primary data sources (UCMR 1, UCM round 1 and 2 cross sections, NIRS)				
				Database	PWSs with at least 1 detection > ½ HRL	Population served by PWSs with at least 1 detection > ½ HRL	PWSs with at least 1 detection > HRL	Population served by PWSs with at least 1 detection > HRL
3	Dacthal mono acid degradate [3] (887–54–7).							
4	DDE [6] (72–55–9)	Do not regulate.	0.2 µg/L	UCMR 1	[7]	[7]	0.03% [7] (1 of 3,874) [8].	0.01% (18K of 226M) [8]
5	1,3-Dichloropropene (Telone) (542–75–6).	Do not regulate.	0.4 µg/L	UCM Rd1 UCM Rd2 UCMR 1	0.16% (15 of 9,164) [9]. 0.30% (50 of 16,787) [9]. [7]	0.86% (436K of 51M) [9]. 0.42% (193K of 46M) [9]. [7]	0.16% (15 of 9,164) [9]. 0.23% (38 of 16,787) [9]. 0.00% (0 of 796) [8]	0.86% (436K of 51M) [9] 0.33% (152K of 46M) [9] 0.00% (0 of 2.8M) [8]
6	2,4-Dinitrotoluene (121–14–2).	Do not regulate.	0.05 µg/L	UCMR 1	[7]	[7]	0.03% (1 of 3,873) [8]	0.02% (38K of 226M) [8]
7	2,6-Dinitrotoluene (606–20–2).	Do not regulate.	0.05 µg/L	UCMR 1	[7]	[7]	0.00% (0 of 3,873) [8]	0.00% (0 of 226M) [8]
8	EPTC [10] (759–94–4)	Do not regulate.	175 µg/L	UCMR 1	0.00% (0 of 3,873)	0.00% (0 of 226M)	0.00% (0 of 3,873)	0.00% (0 of 226M)
9	Fonofos (944–22–9)	Do not regulate.	10 µg/L	UCMR 1	0.00% (0 of 295)	0.00% (0 of 41M)	0.00% (0 of 295)	0.00% (0 of 41M)
10	Terbacil (5902–51–2).	Do not regulate.	90 µg/L	UCMR 1	0.00% (0 of 3,873)	0.00% (0 of 226M)	0.00% (0 of 3,873)	0.00% (0 of 226M)
11	1,1,2,2-Tetrachloroethane (79–34–5).	Do not regulate.	0.4 µg/L	UCM Rd1 UCM Rd2	0.22% (44 of 20,407) [9]. 0.07% (18 of 24,800) [9].	1.69% (1.6M of 95M) [9]. 0.51% (362K of 71M) [9].	0.20% (41 of 20,407) [9]. 0.07% (17 of 24,800) [9].	1.63% (1.5M of 95M) [9] 0.08% (56K of 71M) [9]

[1] EPA also considered the results of an AwwaRF study of PWSs indicating that surface water sources are unlikely to contain boron at levels > the HRL of 1,400 µg/L (Frey et al., 2004).
[2] 2,3,5,6-tetrachloroterephthalic acid (TPA).
[3] monomethyl-2,3,5,6-tetrachloroterephthalate (MTP).
[4] Using the dacthal parent HRL since it includes the toxicity for the degradates.
[5] Degradates monitored in aggregate and converted to the parent equivalent.
[6] 1,1-dichloro-2,2-bis(p-chlorophenyl)ethylene.
[7] Not reported since MRL > ½ the HRL.
[8] Shows results > MRL, rather than > HRL, since MRL is greater than the HRL. In all cases the MRL is within the 10^{-4} to 10^{-6} risk range.
[9] The MRLs used in UCM varied from below the ½ HRL to above the HRL. However, even the highest MRLs used are within the 10^{-4} to 10^{-6} risk range.
[10] s-ethyl dipropylthiocarbamate.

IV. Summary of Public Comments and the Agency's Responses on the CCL Regulatory Determination Process

EPA received comments from nine organizations or individuals on the May 1, 2007, **Federal Register** notice. These nine organizations/individuals include five water-related associations, one industry group, one State agency, one State-related association, and one anonymous person. A majority of the comments focused on the following four over-arching topic areas:

- The regulatory determinations for the 11 contaminants;
- The regulatory determinations approach;
- The occurrence and exposure evaluation; and
- Comments on specific CCL 2 contaminants: boron, perchlorate, MTBE, metolachlor, and cyanobacteria and its toxins.

A complete copy of the public comments and the Agency's responses are included in the Docket for today's action (USEPA, 2008m). The remainder of this section discusses the four key topic areas identified by commenters in response to the May 2007 preliminary regulatory determination notice (72 FR 24016, (USEPA, 2007a)).

A. Regulatory Determinations for the 11 Contaminants

Comment Summary: Most of the commenters agreed with EPA's decisions not to regulate the 11 contaminants. However, one State agency recommended that EPA reconsider its position of not regulating 2,4- and 2,6-DNT because they found these two contaminants in ground water in numerous locations in and around ammunition and military sites in their State.

Agency Response: EPA agrees with the commenters who believe that no regulation is warranted at this time for the 11 contaminants. In response to reconsidering the Agency's decision for 2,4- and 2,6-DNT, EPA respectfully disagrees. Monitoring data collected on 2,4- and 2,6-DNT from UCMR 1 do not indicate that either of these chemicals occurs nationally in public drinking water systems at health levels of concern. EPA found only one detection of 2,4-DNT from among the 3,873 public water systems evaluated and no detections of 2,6-DNT. The information submitted by the commenter does not lead the Agency to change its decision because the occurrence appears to be highly localized and therefore, does not meet statutory criterion 2 (likely to occur in PWSs with a frequency and at a level of concern). To assist State and local communities that may have localized occurrence of 2,4- and/or 2,6-DNT, the Agency has updated the Health Advisory for both of these compounds as part of the regulatory determination process. If a State finds that it has highly localized levels of 2,4- and/or 2,6-DNT above the HRL of 0.05 µg/L, the Agency encourages States to consider whether State-level guidance (or some other type of action) may be appropriate.

B. Regulatory Determinations Approach

Comment Summary: One commenter recommended that EPA expand its discussion of the logic underlying the determinations for these 11 contaminants. The commenter stated that EPA needs to raise the level of transparency in its decision logic so that stakeholders can understand how data and information translate to determinations and to ensure consistency across the two parallel regulatory efforts (regulatory determinations and six-year reviews). The commenter asked for a discussion about the status of the remaining CCL 2 contaminants. In addition, the commenter recommended that EPA's drinking water research agenda be integrated with the regulatory development process.

Another commenter agreed with the determinations not to regulate the 11 contaminants but recommended that EPA include affordability criteria when evaluating whether regulation will result in a meaningful health benefit in future determinations. The commenter submitted a paper in support of their comment.[8]

Agency Response: In response to the first comment, EPA developed a consistent regulatory determination approach for evaluating CCL 2 contaminants that followed the National Drinking Water Advisory Council's (NDWAC, 2000) recommended protocol for both health effects and occurrence analyses. In this notice (section VI), EPA added a narrative and tables that summarize the data gaps for the other 40 CCL 2 contaminants, which kept the Agency from making a regulatory determination at this time. EPA does not believe that it is appropriate to consider a research agenda specifically for those contaminants at this time because the Agency is in the process of developing a new CCL (CCL 3). The new process considers the knowledge and experience gained from evaluating unregulated contaminants on CCL 1 and CCL 2 and the recommendations and advice from the National Academies of Sciences' National Research Council (NRC, 2001) and NDWAC (2004). The Agency anticipates that future CCL research needs will be directed at filling data gaps for contaminants on the new list (i.e., CCL 3), not CCL 2. All CCL 2 contaminants will be examined for inclusion on CCL 3 and those that remain a high priority will be examined for research needs.

In response to the second comment, the SDWA requires that EPA consider the costs and benefits, as well as affordability, as NPDWRs are developed. Specifically, SDWA requires that EPA perform a health risk reduction and cost analysis and an affordability analysis for proposed NPDWRs. EPA respectfully disagrees that an affordability analysis is necessary or required for regulatory determinations. For regulatory determination, SDWA requires that EPA use the three criteria discussed in section III.A. As a result, EPA will evaluate costs and affordability in more detail, including whether small system variances are appropriate, as part of the regulatory process after the Agency makes a positive regulatory determination.

C. Occurrence and Exposure Evaluation

Comment Summary: One commenter stated that ''based on the first round of regulatory determinations, a range of 0.02%–3.2% for national occurrence could be considered as the minimum threshold for development of a new regulation'' and ''national occurrence estimates for these eleven contaminants are well below this threshold, with boron having the highest prevalence of occurrence, at 1.7% of systems sampled in the National Inorganics and Radionuclides Survey (NIRS).''

Another commenter provided a report by Phillips and Chambless[9] that evaluated compliance data for seven contaminants from five States obtained from a cross section of State regulatory agencies. Based on a preliminary analysis, the authors found that the variability in the means of quarterly samples taken for compliance purposes was consistently large. The commenter expressed the opinion that the variability (standard error of the mean divided by the mean) is significant enough (100 percent or more in many cases) to question the validity of decisions made based on the UCMR data (for unregulated contaminants). Based on that study, the commenter stated that there is no reason to assume that the quality of the occurrence data from the UCMR effort would be any better than the quality of the compliance data. The second commenter urged EPA to resolve this quality issue before trying to make CCL 2 regulatory decisions that are based on rather precise calculations of occurrence levels and the number of persons exposed.

Agency Response: In response to the first comment, EPA considers both the extent of national occurrence and the severity of health effects for a contaminant, as well as other factors (e.g., sources of exposure), when deciding whether regulation presents a meaningful opportunity for health risk reduction. As a result, the Agency does not believe it is appropriate to set minimum occurrence thresholds for regulatory determinations.

In response to the second comment regarding variability in occurrence measures based on the compliance monitoring data for regulated contaminants, the Agency believes the variability issues identified by Phillips and Chambless do not directly reflect the dependability of the UCMR 1 data used to support the Agency's regulatory determinations. Compliance monitoring data is State data resulting from individual public water systems efforts to comply with regulatory monitoring requirements. The UCMR 1 is EPA's program to collect data for contaminants suspected to be present in drinking water based upon a statistically-valid data set for nationwide occurrence estimates. The UCMR 1 program was designed to address this variability issue at the national level by defining a vulnerable period (the season of greatest vulnerability of contaminant occurrence, the season of increased flux of water movement) and requiring at least one UCMR 1 sample during that period. In addition, the monitoring periods for the large and small systems were performed over a three year period. Approximately one-third of all small UCMR 1 systems throughout the country conducted monitoring in each of the three years of UCMR 1 monitoring. Furthermore, the monitoring schedules for these systems were conducted to include monitoring in every month and every season around the country. Large systems could conduct their one year of monitoring anytime during the UCMR 1 period from 2001 to 2003. Like small systems, their monitoring schedules were spread throughout the year and were to include one sample during what was considered the most vulnerable season. In this way, the UCMR 1 monitoring results reflect multiple seasons and multiple years of climatic conditions throughout the country and are not directly affected (or biased) by weather conditions of a single season, year, or geographic region. Whereas some variability might still be expected, EPA believes this is unlikely to be a source of bias for national level occurrence estimates.

In addition, it should be noted that EPA used peak occurrence estimates (the number and percent of systems with at least one observed detection greater than ½ the HRL and the HRL) as opposed to mean values in making its final decisions not to regulate the 11 CCL 2 contaminants. Hence, taking variability around the mean into account would not have influenced the outcome of the final determinations for these 11 contaminants. The characterization of national occurrence provided by the UCMR 1 monitoring

[8] This paper can be found in the Docket for this notice at *http://www.regulations.gov* under the Docket ID No. EPA–HQ–OW–2007–0068.

[9] This paper can be found in the Docket for this notice at *http://www.regulations.gov* under the Docket ID No. EPA–HQ–OW–2007–0068.

data is adequate and the best available data to support today's decisions.

D. Comments on Boron, Perchlorate, MTBE, Metolachlor, and Cyanobacteria and Its Toxins

1. Boron. One anonymous commenter agreed with our determination for boron but commented on the fact that the health reference level does not incorporate the results of the preliminary chemical-specific Health Advisory Level (HAL) derived recently by EPA and presented at the 2007 Society of Toxicology (SOT) meeting.

Agency Response: The HRL used in making regulatory determinations is not equivalent to a lifetime health advisory value. As stated in the *Health Effects Support Document for Boron* (USEPA, 2008d) and the May 1, 2007, notice (72 FR 24016 (USEPA, 2007a)), an HRL is a benchmark against which to measure the occurrence data; it is not a Health Advisory guideline. For noncarcinogens such as boron, the HRL is calculated by multiplying the Agency Reference Dose by a 70 kg body weight and a 20 percent default Relative Source Contribution (RSC) and dividing the product by a drinking water intake of 2 L/day.

As described in the May 2007 notice (72 FR 24016 (USEPA, 2007a)) and in evaluating contaminants for regulatory determinations, the Agency initially uses a default 20 percent RSC to estimate the HRLs for non-carcinogens because this approach derives the lowest and most conservative HRL value to use in screening the occurrence data. EPA used this approach to calculate the HRL benchmark for boron and to determine if boron might be occurring nationally at a level of potential health concern. In developing the health advisory for boron, the Agency performed a more refined assessment of the risk for those PWSs that occasionally find levels of boron that exceed the lifetime or shorter term health advisory values. While the Agency derived a more refined RSC for the determination of the lifetime Health Advisory for boron, this value is still limited by the RSC ceiling of 80 percent as a matter of policy. The derivation of health advisory values also incorporates the use of appropriate body weights for the target population. The 2007 SOT poster presentation used a body weight of 67 kg for a pregnant woman, consistent with the Human Health Methodology (USEPA, 2000) guidelines. There may be changes to that policy based on more recent data on pregnancy weights, and if so, the draft Health Advisory will be revised to reflect the new policy.

2. Perchlorate. EPA received comment letters on perchlorate from eight commenters. The major areas of concern raised in the comments related to (1) the Agency's decision not to make a regulatory determination for perchlorate at the same time as for the 11 contaminants for which a regulatory determination is being finalized today, and (2) the Agency's discussion of potential analyses to more fully characterize total perchlorate exposure in order to assess the opportunity for public health protection through a drinking water regulation.

Agency Response: EPA will soon publish a preliminary determination for perchlorate. EPA will request public comment as part of that notice. EPA will consider the comments received on the May 2007 notice (72 FR 24016 (USEPA, 2007a)) with respect to perchlorate as a part of that regulatory determination and will respond to such public comments at the time the Agency issues a regulatory determination for perchlorate. EPA intends to finalize a regulatory determination for perchlorate by December 2008.

3. MTBE. Most commenters supported EPA's decision not to make a regulatory determination for methyl tertiary-butyl ether (MTBE) at this time because the IRIS assessment is currently being revised. Also, one commenter felt that UCMR 1 would provide valuable occurrence data for MTBE when the risk assessment becomes available.

Agency Response: EPA agrees that UCMR 1 data provides important occurrence information on MTBE and will be useful in making a regulatory determination once the final risk assessment is available.

4. Metolachlor. Some commenters noted that additional research for the health effects and occurrence of metolachlor and its degradates is needed. One commenter felt that UCMR 2 would provide valuable occurrence information for metolachlor and its degradates. One commenter did not have additional data but believes more information is needed on the occurrence and health effects of many herbicides and pesticides and their degradates. The results of this research should be appropriately included in regulatory decisions by the Office of Pesticide Programs (OPP) and the Office of Ground Water and Drinking Water. The commenter stated that EPA should promote further research to definitively determine whether metolachlor, a very widely used pesticide, is carcinogenic, as acetochlor, alachlor and metolachlor have very similar chemical structures.

Agency Response: The Agency agrees that more information on the occurrence of metolachlor and its degradates is needed in order to determine if the combined parent compound and its degradates are occurring at levels of health concern. The available metolachlor data from earlier unregulated contaminant monitoring surveys indicate that metolachlor is found in finished water in many locations but at levels below the HRL. The occurrence data on the parent metolachlor, combined with the knowledge that it decomposes to several degradates that are more persistent than the parent, supported the inclusion of both metolachlor and its degradates in UCMR 2. Once available, the UCMR 2 data will be useful in evaluating the occurrence of metolachlor and its degradates in public water systems and will assist the Agency in deciding whether to regulate these compounds.

5. Cyanobacteria and its toxins. In the May 2007 notice (72 FR 24016 (USEPA, 2007a)), EPA asked for comment on the usefulness of providing an information summary about cyanobacteria and its toxins. One commenter responded and recommended that EPA provide an information summary describing the state of the knowledge on the prevention, treatment, and health effects of cyanobacteria and its toxins. The commenter felt that a document would be useful for utilities and State agencies. The commenter recommended that the summary include information on occurrence, conditions that might favor growth of algae and production of toxins, and a strategy for communicating this information to utility customers. In addition, the commenter suggested that the summary include information on research funded by other organizations, particularly the AWWA Research Foundation (AwwaRF).

Agency Response: EPA is developing an information sheet that will include the information suggested by the commenter and links to organizations performing research on the cyanobacteria and its toxins. The Agency anticipates making this information sheet available on its Safewater Web site (*http://www.epa.gov/safewater*) shortly after the publication of this notice.

V. Summary of the Agency's Findings on the 11 CCL 2 Contaminants

A. Boron

1. Description. Boron, a metalloid, tends to occur in nature in the form of borates (e.g., boric acid, borax, boron oxide). Man-made releases are typically in the form of borates or boron halides (e.g., boron trichloride, boron

trifluoride). Boron compounds are used in the production of glass, ceramics, cleaning agents, fire retardants, pesticides, cosmetics, photographic materials, and high energy fuels (USGS, 2004; ATSDR, 1992).

2. Agency Findings. The Agency is making a determination not to regulate boron with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), EPA used data from NIRS and an AwwaRF study (Frey *et al.*, 2004) to evaluate occurrence and exposure at the HRL of 1,400 µg/L (as well as ½ the HRL). The NIRS data indicate that approximately 4.3 percent (or 43) of the 989 ground water PWSs sampled had at least one detection of boron at levels greater than 700 µg/L, affecting approximately 2.9 percent of the population served (or 42,700 people from 1.48 million). Approximately 1.7 percent (or 17) of 989 ground water PWSs sampled had at least one detection of boron at levels greater than 1,400 µg/L, affecting approximately 0.4 percent of the population served (6,400 people from 1.48 million) (USEPA, 2008c and 2008d).

Because NIRS did not contain data for surface water systems, the Agency evaluated the results of the AwwaRF study (Frey *et al.*, 2004) to gain a better understanding of the potential occurrence of boron in surface water systems. The AwwaRF study recruited 189 PWSs representing 407 source waters that covered 41 States. Of these 407 PWS source water samples, 342 were returned and 341 were analyzed for boron. Of these 341 samples, approximately 67 percent (or 228) represented ground water sources and 33 percent (or 113) represented surface water sources. None of the 113 surface water sources exceeded the boron HRL of 1,400 µg/L and the maximum concentration observed in surface water was 345 µg/L. Extrapolation of the data indicates that 95 percent of the ground water detections had boron levels less than 1,054 µg/L; the maximum observed concentration in ground water was approximately 3,300 µg/L. Seven of the 228 ground water sources (from 5 systems) had at least one sample with a boron concentration greater than 1,400 µg/L (Seidel, 2006).

While boron was found at levels greater than the HRL of 1,400 µg/L (and ½ the HRL) in several of the ground water systems surveyed by NIRS, it was not found at levels greater than the HRL (or ½ the HRL) in the surface water sources evaluated in the AwwaRF study. Taking this surface water information into account, the Agency believes the overall occurrence and exposure from both surface and ground water systems together is likely to be lower than the values observed for the NIRS ground water data. Because boron is not likely to occur at health levels of concern when considering both surface and ground water systems, the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction.

The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for boron in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), the final regulatory support document (USEPA, 2008a), and the health effects support document for boron (USEPA, 2008d). The Agency also plans to update the Health Advisory for boron to provide more recent health information. The updated Health Advisory will provide information to any States with public water systems that may have boron above the HRL. If a State finds highly localized occurrence of boron at concentrations above the HRL, the Agency encourages States to consider whether State-level guidance (or some other type of action) may be appropriate.

B. Dacthal Mono- and Di-Acid Degradates

1. Description. Dimethyl tetrachloroterephthalate (DCPA), a synthetic organic compound (SOC) marketed under the trade name ''Dacthal,'' is a pre-emergent herbicide historically used to control weeds in ornamental turf and plants, strawberries, seeded and transplanted vegetables, cotton, and field beans. DCPA is not especially mobile or persistent in the environment. Biodegradation and volatilization are the primary dissipation routes. Degradation of DCPA forms two breakdown products, the mono-acid degradate (monomethyl tetrachloroterephthalate or MTP) and the di-acid degradate (tetrachloroterephthalic acid or TPA). The di-acid, which is the major degradate, is unusually mobile and persistent in the field, with a potential to leach into water (USEPA, 1998a).

2. Agency Findings. The Agency is making a determination not to regulate the DCPA mono-acid degradate and/or the DCPA di-acid degradate with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), these degradates appear to occur infrequently at health levels of concern in PWSs, and the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction. While the Agency recognizes that these degradates have been detected in the PWSs monitored under the UCMR 1, only one PWS detected these degradates at a concentration above the HRL of 70 µg/L.

The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for dacthal mono- and di-acid degradates in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), the final regulatory support document (USEPA, 2008a), and the health effects support document (USEPA, 2008e). The Agency also plans to update the Health Advisory for the DCPA parent to include the mono- and di-acid degradates, as well as any recent health information related to these compounds. The updated Health Advisory will provide information to any States with public water systems that may have DCPA degradates at levels above the HRL. If a State finds highly localized occurrence of DCPA degradates at concentrations above the HRL, the Agency encourages States to consider whether State-level guidance (or some other type of action) may be appropriate.

C. 1,1-Dichloro-2,2-bis(p-chlorophenyl)ethylene

1. Description. DDE is a primary metabolite of 1,1,1-trichloro-2,2-bis(p-chlorophenyl)ethane (DDT), a pesticide used to protect crops and eliminate disease-carrying insects in the U.S. until it was banned in 1973. DDE itself has no commercial use and is only found in the environment as a result of prior contamination with DDT. While DDE tends to adsorb strongly to surface soil and is fairly insoluble in water, it may enter surface waters from runoff that contains DDE bound to soil particles. In both soil and water, DDE is subject to photodegradation, biodegradation, and volatilization (ATSDR, 2002).

2. Agency Findings. The Agency is making a determination not to regulate DDE with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), DDE appears to occur infrequently at health levels of concern in PWSs, and the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction. DDE was detected in only one of the PWSs monitored under the UCMR 1 at a level greater than the MRL (0.8 µg/L). The MRL is greater than the HRL of 0.2 µg/L but represents a concentration that is within the 10^{-4} to the 10^{-6} cancer risk range targeted by

the Agency. In addition, ambient water data from the USGS (Martin et al., 2003; Kolpin and Martin, 2003) indicate that the maximum concentrations detected in surface and ground water were less than the HRL.

The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for DDE in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), the final regulatory support document (USEPA, 2008a), and the health effects support document (USEPA, 2008f). If a State finds highly localized occurrence of DDE at concentrations above the HRL, the Agency encourages States to consider whether State-level guidance (or some other type of action) may be appropriate.

D. 1,3-Dichloropropene

1. Description. 1,3-Dichloropropene (1,3-DCP), a synthetic volatile organic compound, is used as a pre-plant soil fumigant to control nematodes and other pests in soils planted with all types of food and feed crops. 1,3-DCP is typically injected 12 inches to 18 inches beneath the soil surface and can only be used by certified handlers (USEPA, 1998b).

2. Agency Findings. The Agency is making a determination not to regulate 1,3-DCP with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), 1,3-DCP appears to occur infrequently at health levels of concern in PWSs, and the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction. While 1,3-DCP was detected in the UCM Round 1 (late 1980s) and the UCM Round 2 (mid 1990s) surveys, it was not detected in a subsequent evaluation of 796 small systems from the UCMR 1 survey. In addition, the USGS did not detect 1,3-DCP in two occurrence studies performed between 1999 and 2001 using monitoring levels that were lower than the HRL. EPA believes the 1999 pesticide application requirements, which are intended to mitigate risks to drinking water, may be one reason for the lack of occurrence of 1,3-DCP at health levels of concern in subsequent monitoring surveys.

The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for 1,3-DCP in the May 2007 notice (72 FR 24016 (USEPA, 2007a)) and in the health effects support document (USEPA, 2008j). The Agency also plans to update the Health Advisory document for 1,3-DCP with more recent health information. The updated Health Advisory will provide information to any States with public water systems that may have 1,3-DCP above the HRL. If a State finds a highly localized occurrence of 1,3-DCP at concentrations above the HRL, the Agency encourages States to consider whether State-level guidance (or some other type of action) may be appropriate.

E. 2,4-Dinitrotoluene and 2,6-Dinitrotoluene

1. Description. 2,4- and 2,6-dinitrotoluene (DNT), semi-volatile organic compounds, are two of the six isomers of dinitrotoluene. Dinitrotoluenes are used in the production of polyurethane foams, automobile air bags, dyes, ammunition, and explosives, including trinitrotoluene or TNT (HSDB, 2004a and 2004b; ATSDR, 1998). Neither 2,4-DNT nor 2,6-DNT occurs naturally. They are generally produced as individual isomers or as a mixture called technical grade DNT. Technical grade DNT primarily contains a mixture of 2,4-DNT and 2,6-DNT, with the remainder consisting of the other isomers and minor contaminants such as TNT and mononitrotoluenes (HSDB, 2004c).

2. Agency Findings. The Agency is making a determination not to regulate 2,4-or 2,6-DNT with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), 2,4- and 2,6-DNT appear to occur infrequently at health levels of concern in PWSs, and the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction. 2,4-DNT was detected only once at a minimum reporting level (MRL) of 2 µg/L and 2,6-DNT was not detected at this same level in any of the PWSs monitored under the UCMR 1. While the MRL is slightly greater than the HRL of 0.05 µg/L, this concentration is within the acceptable 10^{-4} to the 10^{-6} cancer risk range targeted by the Agency.

The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for 2,4- and 2,6-DNT in the May 2007 notice (72 FR 24016 (USEPA, 2007a)) and in the health effects support document (USEPA, 2008l). The Agency's original Health Advisories for 2,4- and 2,6-DNT were developed for military installations. Because the Agency recognizes that 2,4 and 2,6-DNT may still be found at some military sites, the Agency has updated the Health Advisories to reflect recent health effects publications. EPA published a draft of the updated Health Advisory document for both 2,4 and 2,6-DNT as part of the regulatory determinations for these two isomers. The updated document is available on the Web at: *http://www.epa.gov/safewater/ccl/reg_determine2.html*. The final Health Advisory document will be published in 2008 and will provide information to States with public water systems that may have either 2,4- or 2,6-DNT at concentrations above health levels of concern. If a State finds highly localized occurrence of 2,4- and/or 2,6-DNT at concentrations above the HRL, the Agency encourages States to consider whether State-level guidance (or some other type of action) may be appropriate.

F. s-Ethyl dipropylthiocarbamate

1. Description. EPTC, a synthetic organic compound, is a thiocarbamate herbicide used to control weed growth during the pre-emergence and early post-emergence stages of weed germination. First registered for use in 1958, EPTC is used across the U.S. in the agricultural production of a number of crops, most notably corn, potatoes, dried beans, alfalfa, and snap beans. EPTC is also used residentially on shade trees, annual and perennial ornamentals, and evergreens (USEPA, 1999c).

2. Agency Findings. The Agency is making a determination not to regulate EPTC with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), EPTC does not appear to occur at health levels of concern in PWSs, and the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction. While EPTC has been found in ambient waters at levels less than the HRL of 175 µg/L (as well as ½ the HRL), it was not found in the UCMR 1 survey of public water supplies. The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for EPTC in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), the final regulatory support document (USEPA, 2008a), and in the health effects support document (USEPA, 2008g).

G. Fonofos

1. Description. Fonofos, an organophosphate, is a soil insecticide used to control pests such as corn rootworms, cutworms, symphylans (i.e., garden centipedes), and wireworms. Primarily used on corn crops, fonofos was also used on other crops such as asparagus, beans, beets, onions, peppers, tomatoes, cole crops, sweet

potatoes, peanuts, peas, peppermint, plantains, sorghum, soybeans, spearmint, strawberries, sugarcane, sugar beets, white (Irish) potatoes, and tobacco (USEPA, 1999d).

Fonofos was scheduled for a reregistration decision in 1999. However, before the review was completed, the registrant requested voluntary cancellation. The cancellation was announced in the **Federal Register** on May 6, 1998 (63 FR 25033 (USEPA, 1998d)), with an effective date of November 2, 1998, plus a one-year grace period to permit the exhaustion of existing stocks (USEPA, 1999d).

2. Agency Findings. The Agency is making a determination not to regulate fonofos with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), fonofos does not appear to occur at health levels of concern in PWSs and the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction. While fonofos has been found in ambient waters at levels less than the HRL of 10 μg/L (as well as ½ the HRL), it was not found in the UCMR 1 Screening Survey of public water supplies. Fonofos was voluntarily cancelled in 1998 and the Agency expects any remaining stocks and releases into the environment to decline. In addition, since fonofos tends to bind strongly to soil, any releases to the environment are not likely to contaminate source waters. The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for fonofos in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), the final regulatory support document (USEPA, 2008a), and in the health effects support document (USEPA, 2008h).

H. Terbacil

1. Description. Terbacil, a synthetic organic compound, is a selective herbicide used to control broadleaf weeds and grasses on terrestrial food/feed crops (e.g., apples, mint, peppermint, spearmint, and sugarcane), terrestrial food (e.g., asparagus, blackberry, boysenberry, dewberry, loganberry, peach, raspberry, youngberry, and strawberry), terrestrial feed (e.g., alfalfa, forage, and hay) and forest trees (e.g., cottonwood) (USEPA, 1998c).

2. Agency Findings. The Agency is making a determination not to regulate terbacil with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), terbacil does not appear to occur at health levels of concern in PWSs. Accordingly, the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction. While terbacil has been found in ambient waters at the levels less than the HRL of 90 μg/L (as well as ½ the HRL), it was not found in the UCMR 1 survey of public water supplies. The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for terbacil in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), the final regulatory support document (USEPA, 2008a), and in the health effects support document (USEPA, 2008i).

I. 1,1,2,2-Tetrachloroethane

1. Description. 1,1,2,2-Tetrachloroethane, a volatile organic compound, is not known to occur naturally in the environment (IARC, 1979). Prior to the 1980s, 1,1,2,2-tetrachloroethane was synthesized for use in the production of other chemicals, primarily chlorinated ethylenes. 1,1,2,2-Tetrachloroethane was also once used as a solvent to clean and degrease metals, in paint removers, varnishes, lacquers, and photographic films, and for oil/fat extraction (Hawley, 1981). Commercial production of 1,1,2,2-tetrachloroethane in the U.S. ceased in the 1980s, when other processes to generate chlorinated ethylenes were discovered (ATSDR, 1996).

2. Agency Findings. The Agency is making a determination not to regulate 1,1,2,2-tetrachloroethane with a national primary drinking water regulation. As noted in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), 1,1,2,2-tetrachloroethane appears to occur infrequently at health levels of concern in PWSs. Accordingly, the Agency believes that a national primary drinking water regulation does not present a meaningful opportunity for health risk reduction. While 1,1,2,2-tetrachloroethane was detected in both the UCM Round 1 and the UCM Round 2 surveys, the percentage of detections had decreased by the time the UCM Round 2 survey was performed in the mid-1990's.[10] In addition, the USGS did not detect 1,1,2,2-tetrachloroethane in two subsequent monitoring surveys of source waters that supply community water systems, using a reporting limit that is less than the 1,1,2,2-tetrachloroethane HRL of 0.4 μg/L. The Agency believes that this decrease in detections occurred because commercial production of 1,1,2,2-tetrachloroethane ceased in the mid-1980's. Hence, the Agency does not expect 1,1,2,2-tetrachloroethane to occur in many public water systems today.

[10] The UCM Round 1 and 2 surveys were performed in the late 1980's and the mid 1990's. These surveys should not be confused with the UCMR 1 Screening and Assessment Monitoring that began in 2001.

The Agency presented a complete review of our analysis of the health effects, occurrence, and exposure for 1,1,2,2-tetrachloroethane in the May 2007 notice (72 FR 24016 (USEPA, 2007a)), the final regulatory support document (USEPA, 2008a), and in the health effects support document (USEPA, 2008k). The Agency also plans to update the Health Advisory document for 1,1,2,2-tetrachloroethane to provide more recent health information. The updated Health Advisory will provide information to any States with public water systems that may have 1,1,2,2-tetrachloroethane at levels above the HRL. If a State finds highly localized occurrence of 1,1,2,2-tetrachloroethane at concentrations above the HRL, the Agency encourages States to consider whether State-level guidance (or some other type of action) may be appropriate.

VI. How Will EPA Address the Data Needs of the Remaining CCL 2 Contaminants?

To support decisions on CCL contaminants, the Agency evaluates when and where these contaminants occur, the extent of exposure, and their risk to public health. EPA must also determine if regulating the contaminant presents a meaningful opportunity for reducing public health risk. Contaminants deemed ready for regulatory determination are those that have sufficient health and occurrence data to evaluate both exposure and risk to public health and support a decision as to whether a regulation is appropriate. The remaining CCL 2 contaminants for which decisions are not being made today do not have sufficient data to support regulatory decisions at this time, except for perchlorate, which is the subject of a separate regulatory determination effort (see section IV.D.2 in this notice). Tables 2 and 3 list each contaminant and the type of data lacking for each contaminant.

In addition, the Agency is evaluating the contaminants on CCL 2 as part of the new CCL 3 classification process. The new process is an expanded comprehensive system that evaluates a wider range of existing information, including data published after the CCL 2 preliminary regulatory determinations. The new process also applies revised screening criteria to generate the CCL 3 based upon recommendations from NRC (2001) and NDWAC (2004). EPA anticipates determining future research needs once the CCL 3 is finalized.

TABLE 2—INFORMATION GAPS FOR THE CCL 2 CHEMICAL CONTAMINANTS (AS OF MAY 2007)*

Health effects	Occurrence	Health effects and occurrence
Acetochlor [3]	Diazinon [6]	Alachlor ESA [4 7]
Aluminum [4 5]	2,4-Dichloropheno [6]	Metolachlor [7 8]
Bromobenzene [3]	2,4-Dinitrophenol [6]	Organotins [1 3 5 7]
1,1-Dichloroethane [4]	1,2-Diphenylhydrazine [6]	Prometon [3 6]
1,3-Dichloropropane [4]	Disulfoton [6]	RDX [3 7]
2,2-Dichloropropane [4]	Diuron [6].	
1,1-Dichloropropene [4]	Linuron [6].	
p-Isopropyltoluane [4]	2-Methylphenol [6].	
Methyl Bromide [4]	Terbufos [6].	
Methyl Tertiary-Butyl Ether (MTBE) [3]	Triazines [2 5 7].	
Molinate [3]	2,4,6-Trichlorophenol [6].	
Nitrobenzene [3]		
1,2,4-Trimethylbenzene [4]		
Vanadium [4]		

* Perchlorate is not included in this table (see section IV.D.2).
[1] Organotins include dimethyl tin, dibutyl tin, monomethyl tin, monobutyl tin from PVC stabilizers and triphenyl tin pesticide.
[2] Triazines include the chlorodegradates (DEA, DIA, and DACT) of regulated contaminants—atrazine and simazine.
[3] IRIS or OPP assessment in progress or needs an updated risk assessment.
[4] Insufficient data to do a quantitative risk assessment, health assessment incomplete, or no risk assessment available.
[5] These chemicals also have analytical methods (i.e., organotins) and/or treatment (i.e. triazines, aluminum) gaps.
[6] Insufficient occurrence (sampling) data for a national estimate.
[7] Lack of finished water occurrence (monitoring) data.
[8] Lack of occurrence data for metolachlor's degradates (ESA & OA). Metolachlor and its degradates are on UCMR 2.

TABLE 3—INFORMATION GAPS FOR THE MICROBIAL CONTAMINANTS (AS OF MAY 2007)

Health effects	Occurrence	Treatment	Analytical methods
Microsporidia	Microsporidia	Microsporidia	Microsporidia
Some Cyanotoxins	Some Cyanotoxins	Some Cyanotoxins	Some Cyanotoxins
	Aeromonas	Aeromonas	Aeromonas
	Helicobacter	Helicobacter	Helicobacter
	MAC	MAC	MAC
	Adenoviruses	Adenoviruses	
	Caliciviruses	Caliciviruses	
	Coxsackieviruses	Coxsackieviruses	
	Echoviruses	Echoviruses	

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Dated: July 24, 2008.

Stephen L. Johnson,

Administrator.

[FR Doc. E8–17463 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2003–0397; FRL–8374–6]

Molinate; Product Cancellation Order and Amendment to Terminate Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's amendment to the order for the termination of uses, voluntarily requested by the registrant and accepted by the Agency, of products containing the pesticide molinate, pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This amendment follows an April 7, 2004 **Federal Register** Notice of Order to Amend Registrations to Terminate Uses of molinate to control water grass in rice grown in California and the south central/south eastern states of Arkansas, Louisiana, Missouri, Tennessee, and Texas. Nothing in today's action changes the previous stop production date of June 30, 2008, nor does it change the stop use date of August 31, 2009. Today's action only clarifies the deadline for persons other than the registrant to sell and distribute molinate until July 1, 2009.

DATES: The cancellation amendment is effective July 30, 2008.

FOR FURTHER INFORMATION CONTACT:
Wilhelmena Livingston, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8025; fax number: (703) 308–8005; e-mail address: *livingston.wilhelmena@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2003–0397. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of

operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr*.

II. What Action is the Agency Taking?

This notice announces the amendment of the April 7, 2004 (69 FR 18368) (FRL–7350–9) order to amend registrations to terminate uses of certain end-use molinate products registered under section 3 of FIFRA. These registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1—MOLINATE PRODUCTS AFFECTED

EPA Registration Number	Product Name
100–981	Riceco Molinate Technical
100–982	Riceco Touche
100–983	Molinate 15–G
100–1021	Ordram 8–E An emulsufiable liquid
100–1036	Arrosolo 3–3E
100–1039	Ordram 15–G
100–1040	Ordram Technical
100–1102	Ordram 15GM Rice Herbicide
74530–7	Molinate Technical
CA77015900	Ordram 8–E an emulsufiable liquid
CA84017200	Ordram 8–E an emulsufiable liquid
CA85005300	Ordram 8–E an emulsufiable liquid
TX81002600	Ordram 8–E an emulsufiable liquid
TN93000700	Ordram 15–G

Table 2 of this Unit includes the name and address of record for the Registrants of the product in Table 1 of this Unit, in seqence by EPA company number:

TABLE 2—REGISTRANTS OF AMENDED MOLINATE PRODUCTS

EPA Company Number	Company Name and Address
100	Syngenta Crop Protection, Inc.P.O. Box 18300 Greenboro, NC 27419–8300
74530	Helm Agro U.S., Inc. Nordkanalstrasse 28D–20097 Hamburg, Germany

On April 7, 2004, EPA published a Cancellation Order with respect to products containing S-ethyl hexahyfor-1*H*-azepine-1-carbothioate (monlinate) (69 FR 18368). That order provided: ''The cancellation of these registrations has an effective date of June 30, 2008. After that date, Syngenta Crop Protection Inc., and Helm Agro U.S. Inc, may not sell or distribute any molinate products except as detailed in the cancellation order. Syngenta Crop Protection, Inc., and Helm Agro U.S. Inc., will be permitted to distribute the molinate active ingredient in 2009 for the purposes of facilitating usage by August 31, 2009. No use of products containing molinate is permitted after the 2009 growing season (August 31, 2009).''

Today's action is intended to clarify that in the case of molinate, the original August 31, 2009 deadline for cessation of use was established to provide a reasonable time for the material to work through the channels of trade following the cessation of sale and distribution of molinate products by the registrants, Syngenta Crop Protection, Inc., and Helm Agro U.S. Inc., on June 30, 2008. Today's action does not affect the cancellation of the registrations in Table 1 of Unit II. In addition, clarifying that persons other than the registrants (distributors and retailers) may sell and distribute molinate will neither conflict with the Agency's application of the guidelines outlined in PR Notice 97–7, nor will it introduce more molinate into the pesticide use cycle than had been stipulated by the terms of the five year phase-out. Allowing additional time for distributors and retailers to sell and distribute molinate to end users was contemplated by the original cancellation order by continuing to allow distribution and use. Clarifying this intent will ensure that this product is utilized safely, in accordance with the approved labeling requirements. Thus, today's action clarifies that persons other than the registrant may sell and distribute molinate until July 1, 2009. After July 1, 2009, all sale and distribution is prohibited, except for the purposes of disposal or export. Today's action does not change that end users with existing stocks of products containing molinate may continue to use these products until August 31, 2009, provided that the use complies with previously EPA approved product label requirements for the respective products. Thereafter, all use shall be prohibited except that existing stocks held by end users may be transported for purposes of disposal or returning unused product to the manufacturer or point-of-sale.

III. Amended Order

EPA hereby amends the April 7, 2004 order to clarify the provisions for the disposition of existing stocks. Existing stocks are stocks of registered pesticide product which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation order, which in this case is June 30, 2008. Specifically, persons other than the registrant (distributors and retailers) may sell and distribute products listed in Table 1 of Unit II containing molinate until July 1, 2009. After July 1, 2009, all sale and distribution is prohibited, except for the purposes of disposal or export. End users may continue to use existing stocks until August 31, 2009, provided that the use complies with previously EPA approved product label requirements for the respective products. Thereafter, all use shall be prohibited except that existing stocks held by end users may be transported for purposes of disposal or returning of unused product to the manufacturer or point-of-sale.

IV. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: July 24, 2008.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8–17475 Filed 7–29–08]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2004–0340; FRL–8375–7]

Disulfoton; Amendment to Terminate Certain Uses of Disulfoton Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the amendments to terminate certain uses, voluntarily requested by the registrant and accepted by the Agency, of products containing the pesticide disulfoton, pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. This termination order follows a May 21, 2008 **Federal Register** Notice of Receipt of Requests from the disulfoton technical registrant to voluntarily amend to terminate certain uses of their disulfoton product registrations. The request included termination of all disulfoton use on barley and wheat. Additionally, the use of the granular formulation of disulfoton, Di-Syston 15G (EPA Reg. No. 264-723), on broccoli and commercial ornamentals is being terminated. This order also terminates the use of Di-Syston 15G and the emulsifiable concentrate formulation of disulfoton, Di-Syston 8 EC, (EPA Reg. No. 264-734) on potatoes. This order also amends the disulfoton technical product registration (EPA Reg. No. 264-734) to terminate potato, barley, and wheat uses. These are not the last disulfoton uses or products registered in the United States. In the May 21, 2008 notice, EPA indicated that it would issue an order implementing the amendments to terminate uses, unless the Agency received substantive comments within the 30 day comment period that would merit its further review of these requests, or unless the registrant withdrew their requests within this period. The Agency received comments on the notice but none merited its further review of the requests. The comments received by the Agency are described in Unit III. of this notice. Further, the registrant did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested amendments to terminate uses. Any distribution, sale, or use of the disulfoton products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective July 30, 2008.

FOR FURTHER INFORMATION CONTACT: Eric Miederhoff, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–8028; fax number: (703) 308–7070; e-mail address: *miederhoff.eric@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2004–0340. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr*.

II. What Action is the Agency Taking?

This notice announces the amendments to terminate certain uses, as requested by the technical registrant, of several disulfoton products registered under section 3 of FIFRA. The affected registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1—DISULFOTON PRODUCT REGISTRATION AMENDMENTS TO TERMINATE USES

EPA Registration Number	Product Name	Delete from Label
264-723	Di-Syston 15G	Broccoli, Potato, Wheat, Barley, Ornamentals (commercial uses)
264-725	Di-Syston Technical	Potato, Wheat, Barley
264-734	Di-Syston 8 EC	Potato, Wheat, Barley

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number.

TABLE 2—REGISTRANTS OF AMENDED DISULFOTON PRODUCTS

EPA Company Number	Company Name and Address
264	Bayer CropSciences, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709

III. Summary of Public Comments Received and Agency Response to Comments

Two comments were received during the 30 day comment period established by the May 21, 2008 notice (73 FR 29507; FRL–8364–7). One comment noted the importance of rotating chemicals with different modes of action to help reduce the development of chemical resistance in pest populations. However, this comment did not articulate a specific concern with the actions proposed by the notice. The other comment requested the retention of disulfoton use for control of leafminers in buxus, a family of evergreen shrubs and small trees, often grown for ornamental purposes. The 2002 disulfoton Reregistration Eligibility Decision (RED) examined the risks and benefits of continued use of the granular formulation of disulfoton on commercial ornamentals. Exposure risk to agricultural workers for this scenario was very high and overall documented usage was very low. Additionally, there are several viable leafminer control alternatives to disulfoton. In addition to numerous chemical alternatives, non-chemical pest control options include the employment of leafminer resistant cultivars. Due to the high exposure risk inherent with disulfoton use on commercial ornamentals and the availability of alternative control methods, the Agency maintains the decision described in the 2002 RED, which is that this use is ineligible for reregistration. For these reasons, the Agency does not believe that the comments submitted during the comment period merit further review or a denial of the requests for voluntary use termination.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested amendments to terminate certain uses of disulfoton product registrations identified in Table 1 of Unit II. Accordingly, the Agency orders that the disulfoton product registrations identified in Table 1 of Unit II. are hereby amended to terminate the affected uses. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II. in a manner inconsistent with any of the Provisions for Disposition of Existing Stocks set forth in Unit VI. will be considered a violation of FIFRA.

V. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The cancellation order issued in this notice includes the following existing stocks provisions.

The registrant may continue to sell and distribute existing stocks of products with previously approved labeling that includes the uses terminated by this order, for six months from the effective date of this cancellation order. Persons other than the registrant may continue to sell and/ or use existing stocks of products with previously approved labeling that includes the discontinued uses, until such stocks are exhausted, provided that such use is consistent with the terms of the previously approved labeling on, or that accompanied, the associated products.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: July 23, 2008.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E8–17334 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007-0337; FRL–8375–1]

Notice of Receipt; Petition Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's receipt of the initial filing of a pesticide petition proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before August 29, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007-0337 and the pesticide petition number (PP), by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007-0337. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Susan Stanton, Registration Division

(7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305–5218; e-mail address: *stanton.susan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have a typical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What Action is the Agency Taking?

EPA is announcing its receipt of a pesticide petition filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, which proposes the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petition described in this document contains data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. Additional data may be needed before EPA can make a final determination on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition that is the subject of this notice, which was prepared by the petitioner as required by 40 CFR 180.7(b)(1), is included in the docket for this rulemaking at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced above.

New Tolerances

1. *PP 7F7200*. (EPA–HQ–OPP–2007–0337). Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709, proposes to establish a tolerance for residues of the insecticide, cyfluthrin, cyano(4-fluoro-3-phenoxyphenyl)methyl-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate in or on food commodities barley, grain; buckwheat, grain; millet, grain; oat, grain; rye, grain; triticale, grain; and wheat, grain at 0.15 part per million (ppm); corn, field, grain; corn, pop, grain; and teosinte, grain at 0.05 ppm; sorghum, grain at 3.5 ppm; grain, cereal, forage, fodder and hay, group 16, forage, except rice at 25 ppm; grain, cereal, forage, fodder and hay, group 16, hay, except rice at 6.0 ppm; grain, cereal, forage, fodder and hay, group 16, stover, except rice at 30 ppm; and grain, cereal, forage, fodder and hay, group 16, straw, except rice at 7.0 ppm. Adequate analytical methodology using gas chromatography/electron capture (GC/EC) detection is available for enforcement purposes.

2. *PP 7F7200*. (EPA–HQ–OPP–2007–0337). Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709, proposes to create paragraph (a)(4) in 40 CFR 180.436 and establish a tolerance for residues of the insecticide, beta-cyfluthrin, cyano(4-fluoro-3-phenoxyphenyl)methyl-3-(2,2-dichloroethenyl)-2,2-dimethyl-cyclopropanecarboxylate [mixture comprising the enantiomeric pair (R)-α-cyano-4-fluoro-3-phenoxybenzyl (1S,3S)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropanecarboxylate and (S)-α-cyano-4-fluoro-3-phenoxybenzyl (1R,3R)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropanecarboxylate with the enantiomeric pair (R)-α-cyano-4-fluoro-3-phenoxybenzyl (1S,3R)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropanecarboxylate and (S)-α-cyano-4-fluoro-3-phenoxybenzyl (1R,3S)-3-(2,2-dichlorovinyl)-2,2-dimethylcyclopropanecarboxylate in or

on food commodities alfalfa at 5.0 ppm; alfalfa, forage at 5.0 ppm; alfalfa, hay at 13 ppm; almond, hulls at 0.5 ppm; barley, bran at 0.5 ppm; barley, grain at 0.15 ppm; beet, sugar, dried pulp at 1.0 ppm; beet, sugar, roots at 0.10 ppm; Brassica, head and stem, subgroup 5A at 2.5 ppm; Brassica, leafy greens, subgroup 5B at 7.0 ppm; buckwheat, grain at 0.15 ppm; carrot, roots at 0.20 ppm; cattle, fat at 2.0 ppm; cattle, meat at 0.10 ppm; cattle, meat byproducts at 0.10 ppm; citrus, dried pulp at 0.3 ppm; citrus, oil at 0.3 ppm; corn, field, grain at 0.05 ppm; corn, pop, grain at 0.05 ppm; corn, sweet, kernel plus cob with husks removed at 0.05 ppm; cotton, hulls at 2.0 ppm; cotton, refined oil at 2.0 ppm; cotton, undelinted seed at 1.0 ppm; egg at 0.01 ppm; fruit, citrus, group 10 at 0.2 ppm; fruit, pome, group 11 at 0.5 ppm; fruit, stone, group 12 at 0.3 ppm; goat, fat at 2.0 ppm; goat, meat at 0.05 ppm; goat, meat byproducts at 0.05 ppm; grain, aspirated fractions at 150 ppm; grain, cereal, forage, fodder and hay, group 16, forage, except rice at 25 ppm; grain, cereal, forage, fodder and hay, group 16, hay, except rice at 6.0 ppm; grain, cereal, forage, fodder and hay, group 16, stover, except rice at 30 ppm; grain, cereal, forage, fodder and hay, group 16, straw, except rice at 7.0 ppm; grape at 1.0 ppm; grape, raisin at 3.5 ppm; grass, forage, fodder and hay, group 17, forage at 12 ppm; grass, forage, fodder and hay, group 17, hay at 50 ppm; hog, fat at 0.5 ppm; hog, meat at 0.01 ppm; hog, meat byproducts at 0.01 ppm; hop, dried cones at 20.0 ppm; hop, vines at 4.0 ppm; horse, fat at 2.0 ppm; horse, meat at 0.05 ppm; horse, meat byproducts at 0.05 ppm; lettuce, head at 2.0 ppm; lettuce, leaf at 3.0 ppm; milk at 0.2 ppm; milk, fat at 5.0 ppm; millet, grain at 0.15 ppm; mustard greens at 7.0 ppm; nut, tree, group 14 at 0.01 ppm; oat, bran at 0.5 ppm; oat, grain at 0.15 ppm; pea and bean, dried shelled, except soybean, subgroup 6C at 0.15 ppm; pea, dry, seed at 0.15 ppm; pea, southern, succulent at 0.25 ppm; peanut at 0.01 ppm; peanut, hay at 6.0 ppm; pepper at 0.50 ppm; pistachio at 0.01 ppm; poultry, fat at 0.01 ppm; poultry, meat at 0.01 ppm; poultry, meat byproducts at 0.01 ppm; radish, roots at 1.0 ppm; rye, bran at 0.5 ppm; rye, grain at 0.15 ppm; sheep, fat at 2.0 ppm; sheep, meat at 0.05 ppm; sheep, meat byproducts at 0.05 ppm; sorghum, grain, grain at 3.5 ppm; soybean, forage at 8.0 ppm; soybean, hay at 4.0 ppm; soybean, seed at 0.03 ppm; sugarcane, cane at 0.05 ppm; sugarcane, molasses at 0.20 ppm; sunflower, forage at 5.0 ppm; sunflower, seed at 0.02 ppm; teosinte, grain at 0.05 ppm; tomato at 0.20 ppm; tomato, paste at 0.5 ppm; tomato, pomace at 5.0 ppm; triticale, grain at 0.15 ppm; turnip, greens at 7.0 ppm; vegetable, cucurbit, group 9 at 0.1 ppm; vegetable, fruiting, group 8 at 0.5 ppm; vegetable, leafy greens, except Brassica, group 4 at 6.0 ppm; vegetable, tuberous and corm, subgroup 1C at 0.01 ppm; wheat, bran at 0.5 ppm; wheat, grain at 0.15 ppm; and wheat, shorts at 0.5 ppm. Adequate analytical methodology using GC/EC detection is available for enforcement purposes.

Amendment to Existing Tolerances

1. *PP 7F7200.* (EPA–HQ–OPP–2007–0337). Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709, proposes to amend the tolerances in 40 CFR 180.436 for residues of the insecticide, cyfluthrin, cyano(4-fluoro-3-phenoxyphenyl)methyl-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate, in or on the food commodities barley, bran from 5.0 ppm to 0.5 ppm; cattle, fat from 10.0 ppm to 2.0 ppm; cattle, meat from 0.40 ppm to 0.10 ppm; cattle, meat byproducts from 0.40 ppm to 0.10 ppm; goat, fat from 10.0 ppm to 2.0 ppm; goat, meat from 0.40 ppm to 0.05 ppm; goat, meat byproducts from 0.40 ppm to 0.05 ppm; grain, aspirated fractions from 600 ppm to 150 ppm; hog, fat from 10.0 ppm to 0.5 ppm; hog, meat from 0.40 ppm to 0.01 ppm; hog, meat byproducts from 0.40 ppm to 0.01 ppm; horse, fat from 10.0 ppm to 2.0 ppm; horse, meat from 0.40 ppm to 0.05 ppm; horse, meat byproducts from 0.40 ppm to 0.05 ppm; milk from 1.0 ppm to 0.2 ppm; milk, fat from 30.0 ppm to 5.0 ppm; oat, bran from 5.0 ppm to 0.5 ppm; rye, bran from 5.0 ppm to 0.5 ppm; sheep, fat from 10.0 ppm to 2.0 ppm; sheep, meat from 0.40 ppm to 0.05 ppm; sheep, meat byproducts from 0.40 ppm to 0.05 ppm; wheat, bran from 6.5 ppm to 0.5 ppm; and wheat, shorts from 11.0 ppm to 0.5 ppm. Adequate analytical methodology using GC/EC detection is available for enforcement purposes.

2. *PP 7F7200.* (EPA–HQ–OPP–2007–0337). Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709, proposes to delete the tolerances in 40 CFR 180.436 for residues of the insecticide, cyfluthrin, cyano(4-fluoro-3-phenoxyphenyl)methyl-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate, in or on the food commodities corn, field, forage at 3.0 ppm; corn, field, milled byproducts at 7.0 ppm; corn, field, refined oil at 30.0; corn, field, stover at 6.0 ppm; corn, pop, stover at 6.0 ppm; corn, sweet, forage at 15.0 ppm; corn, sweet, stover at 30.00 ppm; grain, cereal, group 15 at 4.0 ppm; rice, bran at 6.0 ppm; rice, hulls at 18.0 ppm; sorghum, grain, forage at 2.0 ppm; sorghum, grain, stover at 5.0 ppm; wheat, forage at 5.0 ppm; wheat, hay at 6.0 ppm; and wheat, straw at 6.0 ppm.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 22, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E8–17452 Filed 7–29–08; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (*http://www.fmc.gov*) or contacting the Office of Agreements (202)–523–5793 or *tradeanalysis@fmc.gov*).

Agreement No.: 012047.

Title: Panama/U.S. Gulf Agreement.

Parties: A.P. Moller-Maersk A/S and Hamburg Sud.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street Suite 900; Washington, DC 20036.

Synopsis: The agreement would authorize A.P. Moller-Maersk A/S to charter space to Hamburg Sud in the trade between Panama and the U.S. Gulf Coast for cargo originating in Australia/New Zealand.

Agreement No.: 201191.

Title: Marine Terminal Services Agreement between Port of Houston Authority and ALIANCA Navegacao E Logistica, Ltd.

Parties: Port of Houston Authority; and ALIANCA.

Filing Party: Erik A. Eriksson, Esq.; General Counsel; Port of Houston Authority; PO Box 2562; Houston, TX 77252–2562.

Synopsis: The agreement authorizes Port of Houston Authority to establish discounted rates and preferential berthing rights for ALIANCA Navegacao E Logistica, Ltd.'s vessels calling at the port.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–17484 Filed 7–29–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants

Toyo Logistics America, Inc., 20675 S. Western Ave., Ste. 208, Torrance, CA 90501, *Officer:* Yukie Ansotigue, Secretary (Qualifying Individual).

Global Relogistics, Inc., 5337 Orange Drive, Davie, FL 33314, *Officer:* Alon Ezra, President (Qualifying Individual).

Allstate Int'l Freight USA, Inc. dba A.I.F. Company, 200 E. Stanley Street, Compton, CA 90220, *Officers:* Se Hwan Park, CEO, (Qualifying Individual) Hee Yeon Yoo, CFO/Secretary.

Inter-Continental Trading, Inc. dba Inter-Continental, Trading Group, Inc.: Yuan Mao Logistics, 800 S. Date Ave., Ste. 202, Alhambra, CA 91803, *Officer:* Cheng Z. Zhou, President (Qualifying Individual).

Unity Van Lines, Inc., 574 Newark Ave., Ste. 206, Jersey City, NJ 07306, *Officers:* Idan Dachut, President, (Qualifying Individual) Michelle Dachut, Vice President.

Seamen Freight Logistics, Inc., 155–06 South Conduit Ave., Jamaica, NY 11434, *Officer:* Cheuk Yiu Li, President (Qualifying Individual).

Steel Direct Shipping Line, LLC, 3200 E. Frontera Street, Anaheim, CA 92806, *Officers:* David Thomburg, Vice President, Silvana Jones, Vice President, (Qualifying Individuals) George Adams, President.

Turkish Express Line, Inc., 115 River Road, Ste. 827, Edgewater, NJ 07020, *Officers:* Ipek Sokman, President, (Qualifying Individual) Oytun Cakir, Vice President.

MIA Trans Corp., 8174 SW. 118 Pl., Miami, FL 33183, *Officers:* Donald H. Pertuz, President, (Qualifying Individual) Marilena Pertuz, Vice President.

Access Technology Solutions, LC dba Sagawa Logistics, 5252 North Edgewood Drive, #275, Provo, UT 84604, *Officers:* Quinn R. Marsh, Vice President of Sales, (Qualifying Individual) Allan O'Bryant, Member.

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Glodex, Corp., 7235 NW. 54th Street, Miami, FL 33166, *Officer:* Antonia Cabaleiro, President (Qualifying Individual).

Norman G. Jensen, Inc. dba Jensen Marine Services, 3050 Metro Drive, Ste. 300, Minneapolis, MN 55425–1545, *Officer:* Timothy R. Thoma, Asst. Vice President Exports (Qualifying Individual).

Global Alliance (USA), Inc. dba Global Alliance Line, 9550 Flair Drive, #212, El Monte, CA 91731, *Officer:* Rong Xia Wang, Vice President (Qualifying Individual).

Bosmak, Inc. dba Ocean Breeze Shipping, 2501 Harford Road, Baltimore, MD 21218, *Officer:* Steve Onyilokwu, President (Qualifying Individual).

E–Z Cargo Inc., 501 New Country Road, Secaucus, NJ 07094, *Officers:* Alevtina Michina, Vice President, (Qualifying Individual) Michael Abramov, President.

United Logistics Corp., 3650 Mansell Road, #400, Alpharetta, GA 30022, *Officer:* Jason S. Ewing, Operations Manager (Qualifying Individual).

Martin Bencher USA, LLC, 1121 Bristol Road, Mountainside, NJ 07092, *Officers:* Rodger Evans, Secretary, (Qualifying Individual) Morten Olesen, Member/CEO.

Horizon Logistics, LLC dba HRZ Logistics, LLC, 600 E. Las Colinas Blvd., Ste. 550, Irving, TX 75039, *Officers:* Brian Taylor, President, (Qualifying Individual) Frank Knafeiz, Vice President.

Superior Shipping Line Inc., 8641 Cherry Lane, Laurel, MD 20707, *Officer:* Tolulope Akinso, President (Qualifying Individual).

Baseline Global Corp, 15 Rolling Hills Drive, Somerset, NJ 08873, *Officers:* Paul A. Byrnes, COO, (Qualifying Individual) Annabelle T. Erickson, President.

Aeromundo Express, Inc., 8282 NW. 14 Street, Miami, FL 33126, *Officer:* Cristino E. Luna, President (Qualifying Individual).

Jeff's Expres, LLC, 225 W. Trade Street, Burlington, NC 27217, *Officers:* Oswald Jeffers, CEO, (Qualifying Individual) Michelle Philips, President.

FedEx Trade Networks Transport & Brokerage, Inc., 128 Dearborn Street, Buffalo, NY 14207, *Officer:* Leman G. Bown, Jr., Asst. Secretary (Qualifying Individual).

Argos Freight, Inc. dba Agility Freight, Inc., 8054 East Garvey Avenue, Ste. 103, Rosemead, CA 91770, *Officers:* Kuan C. Lee, Secretary, (Qualifying Individual) Shiao C. Cheng, President.

Dated: July 25, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–17461 Filed 7–29–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of June 24–25, 2008

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on June 24–25, 2008.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long–run objectives, the Committee in the immediate future seeks conditions in reserve markets consistent with maintaining the federal funds rate at an average of around 2 percent.

By order of the Federal Open Market Committee, July 17, 2008.

Brian F. Madigan,

Secretary, Federal Open Market Committee.

[FR Doc. E8–17472 Field 7–29–08; 8:45 am]

BILLING CODE 6210–01–S

[1] Copies of the Minutes of the Federal Open Market Committee meeting on June 24–25, 2008, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

FEDERAL TRADE COMMISSION

[Project No. P944509]

Reopening and Extension of Time for Comments Concerning Proposal to Rescind Guidance Concerning the Current Cigarette Test Method

AGENCY: Federal Trade Commission.

ACTION: Notice of extension of comment period.

SUMMARY: The Federal Trade Commission \(''FTC'' or ''Commission'') has extended the date by which comments must be submitted concerning its proposal to rescind Commission guidance that it is generally not a violation of the FTC Act to make factual statements of the tar and nicotine yields of cigarettes when statements of such yields are supported by testing conducted pursuant to the Cambridge Filter Method. This document informs prospective commenters of this change and sets a new date of September 12, 2008.

DATES: Comments must be submitted on or before September 12, 2008.

ADDRESSES: Interested parties are invited to submit comments. Comments should refer to ''Cigarette Test Method, [P944509]'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered, with two complete copies, to the following address: Federal Trade Commission, Office of the Secretary, Room H–135 (Annex L), 600 Pennsylvania Avenue, NW., Washington, DC 20580. Because paper mail in the Washington area and at the Commission is subject to delay, please consider submitting your comments in electronic form, as described below. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper form, and the first page of the document must be clearly labeled ''Confidential.'' [1]

Comments filed in electronic form should be submitted by following the instructions on the web-based form at *https://secure.commentworks.com/ftc-CigaretteTestMethod.* To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the *https://secure.commentworks.com/ftc-CigaretteTestMethod* weblink. If this Notice appears at *http://www.regulations.gov*, you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy at *http://www.ftc.gov/ftc/privacy/htm.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Rosemary Rosso, Senior Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2174.

SUPPLEMENTARY INFORMATION: On July 14, 2008, the Commission published in the **Federal Register** a Request for Comments on its proposal to rescind the FTC's guidance concerning the current cigarette test method.[2] That guidance, announced in 1966, indicates that factual statements of tar and nicotine yields based on the Cambridge Filter Method generally will not violate the FTC Act.[3] If the Commission withdraws this guidance, advertisers should not use terms such as ''per FTC Method'' or other phrases that state or imply FTC endorsement or approval of the Cambridge Filter Method or other machine-based test methods. The **Federal Register** Notice (''Notice'') sought public comment on its proposal as well as comment on the effects the proposal would likely have on smokers' purchases of cigarettes and/or their smoking behavior. Pursuant to this **Federal Register** Notice, the current comment period is scheduled to end on August 13, 2008.

Philip Morris USA has requested that the Commission extend the comment period for an additional 60 days, or through October 14, 2008. According to Philip Morris, the extension will allow it and other interested parties to prepare more considered and comprehensive comments.

The Commission appreciates the need to provide adequate opportunity for commenters to submit timely comments. The Commission likewise recognizes the need to obtain comments from parties directly affected by the proposal. The Commission believes that an additional 30 days is sufficient to allow commenters to provide considered and comprehensive comments. Accordingly, the Commission has decided to extend the deadline for comments until September 12, 2008.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. E8–17421 Filed 7–29–08; 8:45 am]

BILLING CODE 6750–01–P

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

[2] 73 FR 40,350 (Jul. 14, 2008).

[3] For some time, the Commission has been concerned that the machine-measured yields determined by the Cambridge Filter Method may be misleading to individual consumers who rely on the yields as indicators of the amount of tar, nicotine, and carbon monoxide they actually will get from smoking a particular cigarette. In fact, the current yields tend to be relatively poor indicators of tar, nicotine, and carbon monoxide exposure, and do not provide a good basis for comparison among cigarettes.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–08–08BJ]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Maryam Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

A Study of Primary and Secondary Prevention Behaviors Practiced Among Five-Year Survivors of Colorectal Cancer—New—Division of Cancer Prevention and Control (DCPC), National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Colorectal cancer (CRC) is the third most prevalent cancer and the second leading cause of cancer death in both men and women in the United States. In 2004, there were an estimated 145,083 new cases of colorectal cancer diagnosed and 53,580 deaths. However, the five-year relative survival rates of patients diagnosed with CRC have been steadily increasing since 1975 and there are now over 1 million CRC survivors in the U.S.

Despite improved survival rates, CRC survivors are at an elevated risk for cancer recurrence, second primary cancers, and other health problems after being treated for cancer. Research evidence suggests that these elevated risks can be mitigated by healthy lifestyle practices such as exercise and smoking cessation, and by undergoing regular medical follow-up and cancer screenings. A number of medical organizations, therefore, recommend that CRC survivors follow public health and clinical guidelines for prevention behaviors, medical follow-up, and cancer screenings.

A thorough understanding of how individuals make decisions about health care and cancer prevention following cancer diagnosis is imperative for developing public health policies, programs, and interventions to promote health and increased quality of life after cancer, but little is known about the factors that motivate or hinder the adoption of cancer prevention and screening behaviors among cancer survivors. Therefore, the goal of the current study is to identify the key factors associated with practicing (or not practicing) recommended prevention behaviors.

The proposed study will employ a survey of 5-year CRC survivors to collect information about knowledge, attitudes, psychosocial factors, health status and behaviors, and utilization of health care services including screening services. Respondents will be individuals who have previously received a diagnosis of CRC, and will be identified through California Cancer Registry records. Permission to contact these individuals about participation in the study will be obtained from their physicians. Each physician associated with one or more CRC patients will be responsible for reviewing a customized list of names to identify patients who should not be contacted. Following receipt of physician permission, individuals who are eligible for the study will receive a pre-notification letter to inform them about the study and to give them an option to decline participation. Respondents who are recruited to the study will complete a self-administered survey that will be delivered and returned by mail. Non-response will be followed by an invitation to complete the survey via telephone interview. We estimate that 1,950 physicians will be contacted and that we will receive completed surveys from 1,000 CRC survivors.

Findings from this study will help guide future policies, programs, and interventions developed to enhance and improve the long-term health and well being of cancer survivors.

There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Physicians	List of Potential Study Participants	1,950	1	13/60	423
CRC Survivors	Survey of Health Behaviors	1,000	1	40/60	667
Total					1,090

Dated: July 23, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–17418 Filed 7–29–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–08–05CS]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Nurse Delivered Risk Reduction Intervention for HIV-Positive Women—New—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

During the past two decades, HIV surveillance data indicate an increase in HIV/AIDS cases among women in the non-urban Southeastern United States. In 2006, the majority of HIV/AIDS cases (80%) among women were attributed to high-risk heterosexual contact with an infected partner. Women of color, particularly Black women, are disproportionately affected by HIV/AIDS which also serves as a leading cause of death for Black women. Factors shown to be associated with HIV in the South include poverty, lack of access to medical care, poor education, lack of awareness of the disease, and exposure to other sexually transmitted diseases. Presently, there is an urgent need for enhanced HIV transmission prevention interventions for HIV positive women in the southeastern United States.

The purpose of this project is to adapt and test the efficacy of an HIV transmission prevention intervention for reducing sexual risk among 330 HIV positive women in the Southeastern United States, and to study factors associated with risk among women. A brief, nurse delivered, single session intervention will be evaluated using a randomized wait-list comparison design with a three-month follow-up assessment. This project will also conduct in-depth qualitative interviews with a subgroup of 25–30 women, in order to assess experiences with the intervention, elicit recommendations for developing risk reduction intervention strategies, and to better understand the factors that place women at risk for HIV.

CDC is requesting approval for a 2-year clearance for data collection. This project will collect data from HIV positive women using a screening form to determine eligibility for participation in the study, a locator form to collect contact information from participants and a baseline and follow-up behavioral assessment that will be administered to 330 HIV positive women. The baseline and follow-up assessments contain questions about participants' socio-demographic information, health and health care, sexual activity, substance use, and other psychosocial issues. The duration of each assessment is estimated to be 45 minutes; the in-depth interview 60 minutes; the screening form 10 minutes; and the locator form 3 minutes.

There is no cost to the participants other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Screening Form	550	1	10/60	92
Locator Form	330	1	3/60	17
Assessment Baseline/Follow-up	330	2	45/60	495
In-depth Interview Guide	30	1	1	30
Total				634

Dated: July 24, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–17419 Filed 7–29–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, Coordinating Office for Terrorism Preparedness and Emergency Response

Correction: This notice was published in the **Federal Register** on July 7, 2008, Volume 73, Number 130, Page 38460. The times and dates for the aforementioned meeting have been changed to the following:

Times and Dates: 1 p.m.–4:45 p.m., August 5, 2008. 10:30 a.m.–3:30 p.m., August 6, 2008.

Contact Person for More Information: Barbara Ellis, Coordinating Office for Terrorism Preparedness and Emergency Response, CDC, 1600 Clifton Road, NE., Mailstop D44, Atlanta, GA 30333.Telephone: (404) 639–1528. E-mail: *COTPER.BSC.Questions@cdc.gov.* The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: July 23, 2008.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E8–17417 Filed 7–29–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Developmental Disabilities Protection and Advocacy Program Performance Report.

OMB No.: 0980–0160.

Description: This information collection is required by federal statute. Each State Protection and Advocacy System must prepare and submit a Program Performance Report for the preceding fiscal year of activities and accomplishments and of conditions in the State. The information in the Annual Report will be aggregated into a national profile of Protection and Advocacy Systems. It will also provide Administration on Developmental Disabilities (ADD) with an overview of program trends and achievements and will enable ADD to respond to administration and congressional requests for specific information on program activities. This information will also be used to submit a Biennial Report to Congress as well as to comply with requirements in the Government Performance and Results Act of 1993.

Respondents: Protection & Advocacy Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Developmental Disabilities Protection and Advocacy Program Performance Report	57	1	44	2,508

Estimated Total Annual Burden Hours: 2,508.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: July 23, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8–17300 Filed 7–29–08; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Proposed Projects

Title: Generic Clearance to conduct pre-testing of surveys.

OMB No.: New Collection.

Description: The Office of Planning, Research and Evaluation (OPRE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), intends to request approval from the Office of Management and Budget (OMB) for a generic clearance that will allow OPRE to conduct a variety of data gathering activities aimed at identifying questionnaire and procedural problems in survey administration. Over the next three years, OPRE anticipates undertaking a variety of new surveys as part of research projects in the fields of cash welfare, employment and self-sufficiency, Head Start, child care, healthy marriage and responsible fatherhood, and child welfare, among others. In order to improve the development of its research and evaluation surveys, OPRE envisions using a variety of techniques including field tests, respondent debriefing questionnaires, cognitive interviews and focus groups in order to identify questionnaire and procedural problems, suggest solutions, and measure the relative effectiveness of alternative survey solutions.

Following standard OMB requirements, OPRE will submit a change request to OMB individually for every data collection activity undertaken under this generic clearance. OPRE will provide OMB with a copy of the individual instrument or questionnaire, as well as other materials describing the project and specific survey pre test.

Respondents: The respondents will be identified at the time that each change request is submitted to OMB. Generally, they will be individuals who are representative of the target groups for the public assistance research or evaluation project in question.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Survey development field tests, respondent debriefing questionnaires, cognitive interviews and focus groups	1,000	1	1	1,000

Estimated Total Annual Burden Hours: 1000.

Additional Information:

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *OPREInfoCollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

OMB Comment:

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, FAX: 202–395–6974, Attn: Desk Officer for ACF.

Dated: July 16, 2008.

Brendan C. Kelly,

OPRE Reports Clearance Officer.

[FR Doc. E8–17352 Filed 7–29–08; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Proposed Projects

Title: Generic Clearance To Conduct Qualitative Data Collections.

OMB No.: New Collection.

Description: The Office of Planning, Research and Evaluation (OPRE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), intends to request approval from the Office of Management and Budget (OMB) for a generic clearance that will allow OPRE to conduct a variety of qualitative data collections. Over the next three years, OPRE anticipates undertaking a variety of new research projects in the fields of cash welfare, employment and self-sufficiency, Head Start, child care, healthy marriage and responsible fatherhood, and child welfare. In order to inform the development of OPRE research, to maintain a research agenda that is rigorous and relevant, and to ensure that research products are as current as possible, OPRE will engage in a variety of qualitative data collections in concert with researchers and practitioners throughout the field. OPRE envisions using a variety of techniques including semi-structured discussions, focus groups, telephone interviews, and in person observations and site visits, in order to integrate the perspectives of program operators, policy officials and members of the research community.

Following standard Office of Management and Budget (OMB) requirements, OPRE will submit a change request to OMB individually for every group of data collection activities undertaken under this generic clearance. OPRE will provide OMB with a copy of the individual instruments or questionnaires (if one is used), as well as other materials describing the project.

Respondents: Administrators or staff of State and local agencies or programs in the relevant fields; academic researchers; and policymakers at various levels of government.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Semi-Structured Discussion and Information-Gathering Protocol	600	1	.5	300

Estimated Total Annual Burden Hours: 300.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *OPRElnfoCollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, FAX: 202–395–6974, Attn: Desk Officer for ACF.

Dated: July 16, 2008.

Brendan C. Kelly,

OPRE Reports Clearance Officer.

[FR Doc. E8–17353 Filed 7–29–08; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0379]

Draft Guidance for Industry: Nucleic Acid Testing to Reduce the Possible Risk of Parvovirus B19 Transmission by Plasma-Derived Products; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled ''Guidance for Industry: Nucleic Acid Testing (NAT) to Reduce the Possible Risk of Parvovirus B19 Transmission by Plasma-Derived Products,'' dated July 2008. The draft guidance document provides to manufacturers of plasma-derived products recommendations for performing parvovirus B19 NAT as an in-process test for Source Plasma and recovered plasma to identify and help to prevent the use of plasma units containing high levels of parvovirus B19. The draft guidance also recommends how to report to the FDA implementation of parvovirus B19 NAT.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115 (g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by October 28, 2008.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Paul E. Levine, Jr., Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Guidance for Industry: Nucleic Acid Testing (NAT) to Reduce the Possible Risk of Parvovirus B19 Transmission by Plasma-Derived Products'' dated July 2008. Parvovirus B19 is a small, non-enveloped single strand DNA virus that is highly resistant to all commonly used inactivation methods. The parvovirus B19 can be transmitted by blood components and certain plasma derivatives and may cause morbidity to susceptible recipients such as pregnant women, persons with underlying hemolytic disorders, and immune compromised individuals. The disease transmission from transfusion of blood components is rare; however, extremely high levels of parvovirus B19 in plasma of acutely infected but asymptomatic donors may present a greater risk in plasma derivatives due to pooling of large numbers of plasma units in the manufacture of these products.

The draft guidance provides recommendations for performing parvovirus B19 NAT as an in-process test for Source Plasma and recovered plasma used in the further manufacturing of plasma-derived products to identify and help to prevent the use of plasma units containing high levels of parvovirus B19. The draft guidance also recommends how to report to the FDA implementation of parvovirus B19 NAT.

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 211.165 and 211.194 have been approved under 0910–0139; the collections of information in 21 CFR 600.12 have been approved under 0910–0308.

III. Comments

The draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the draft guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in the brackets in the heading of this document. A copy of the draft guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/cber/guidelines.htm* or *http://www.regulations.gov*.

Dated: July 16, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–17431 Filed 7–29–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Council on Drug Abuse.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Drug Abuse.

Date: September 9–10, 2008.

Closed: September 9, 2008, 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Open: September 10, 2008, 8:30 a.m. to 1 p.m.

Agenda: This portion of the meeting will be open to the public for announcements and reports of administrative, legislative and program developments in the drug abuse field.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Teresa Levitin, PhD, Director, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 443–2755.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.drugabuse.gov/NACDA/NACDAHome.html*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: July 22, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–17259 Filed 7–29–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences, Special Emphasis Panel, Minority Biomedical Research Support in Genetics.

Date: August 20, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Office of Scientific Review, Building 45, Room 3AN12, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lisa Dunbar, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–2849, *dunbarl@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.82 1 Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: July 22, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–17258 Filed 7–29–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel Quantification of Drugs of Abuse and Related Substances in Biological Specimens.

Date: August 6, 2008.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: Courtyard by Marriott Rockville, 2500 Research Boulevard, Rockville, MD 20850.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1439, *lf33c.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: July 22, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–17260 Filed 7–29–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Statement of Organization, Functions, and Delegations of Authority

Part M of the Substance Abuse and Mental Health Services Administration (SAMHSA) Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services at 72, Number 198, page 58317–58318, October 15, 2007 is amended to reflect changes of the functional statements for the Center for Mental Health Services (CMHS), Division of Prevention, Traumatic Stress and Special Programs (DPTSSP), and the Division of Service and Systems Improvement (DSI). These amendments are necessary to reflect the increase in program growth of these two divisions, alleviate workload pressures faced by staff, make process improvement, and provide for effectiveness and efficiency of operations. The changes are as follows:

Section M.20, Functions is amended as follows:

The functional statements for the CMHS' DPTSSP and DSI are replaced with the following:

Center for Mental Health Services

Division of Prevention, Traumatic Stress and Special Programs (MSC)

(1) Serves as the focal point in planning for alcohol, drug abuse, and mental health services during national disasters; (2) cooperates with the Assistant Secretary for Preparedness and Response and the Federal Emergency Management Agency (FEMA) and other Federal agencies to coordinate disaster assistance, community response, and other mental health emergency services as a consequence of national disasters or mass criminal events, such as terrorism and school shootings; (3) serves as a focal point for refugee mental health programs, including liaison with other Federal agencies; (4) conducts program development activities and engages with the faith community, when appropriate, to promote effective programs and polices to special populations including women, minorities, youth in juvenile justice facilities, and elderly persons living in rural areas; and (5) administers youth violence and suicide prevention programs, trauma and terrorism/bio-terrorism initiatives, and programs that prevent mental and behavioral disorders and promote mental health and resilience across the lifecycle.

Division of Service and Systems Improvement (MSF)

(1) Develops, plans, implements, and monitors national activities designed to improve systems and service delivery for persons with, or at risk for, mental health problems; (2) directs a clearinghouse that serves as a one-stop information and referral service for the public, consumers and family members, educators, policymakers, and for those

who design, finance, and deliver mental health services; (3) administers the Projects for Assistance in Transition from Homelessness (PATH) program; and (4) directs the Comprehensive Community Mental Health Services for Children with Serious Emotional Disturbances Program; (5) places priority on two target populations, adults with severe mental illness (including those who are homeless) and children and adolescents with serious mental disturbances; (6) emphasizes acquisition, exchange, and application of knowledge in all of its activities; (7) develops Guidances for Applications and requests for contracts to implement these activities; (8) monitors grants, cooperative agreements, contracts, interagency agreements, and memoranda of understanding; (9) identifies needs for and provides technical assistance to a variety of customers through both direct and indirect activities, including the development of standards and guidelines; (10) establishes and maintains collaborative relationships with other Federal, State, and local governmental agencies, national organizations, local communities, providers, consumers, and families; (11) promotes adoption of practices in communities through the Nation by synthesizing knowledge, exchanging information, and providing opportunities for consensus building, and (12) promote the prevention of HIV infection in people at risk, the delivery of effective mental health services for people with HIV infection, and the education of health care providers to address the neuropsychiatric and the psychosocial aspects of HIV infection and AIDS and maintains liaison with national organizations and other Federal departments.

Delegation of Authority

All delegations and redelegations of authority to officers and employees of SAMHSA which were in effect immediately prior to the effective date of this reorganization shall continue to be in effect pending further redelegations, providing they are consistent with the reorganization.

These organizational changes are effective.

Dated: July 23, 2008.

Terry L. Cline,

Administrator.

[FR Doc. E8–17371 Filed 7–29–08; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2008–0074]

The Critical Infrastructure Partnership Advisory Council

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: Notice of update to DHS–2008–0074, the Critical Infrastructure Partnership Advisory Council (CIPAC) Meeting

SUMMARY: The update provides a change to the previously published FRN DHS–2008–0074, which moved the start time of the Critical Infrastructure Partnership Advisory Council meeting on July 30, 2008, from 8:20 a.m. Eastern Daylight Time (EDT) to 8 a.m. EDT. The meeting will adjourn at 4 p.m. EDT. Check-in for the meeting will begin at 7:30 a.m. EDT. Please note that the meeting may adjourn early if the committee has completed its business.

The meeting agenda is as follows:

7:30 a.m. Registration.
8 a.m. Call to Order: Sector Roll Call.
8:10 a.m. The Three Pillars of the CIPAC Partnership.
8:30 a.m. The Pathway to the Present: How We Got Where We Are Now.
8:50 a.m. Setting the Stage for Today's Discussions.
9 a.m. DHS and the National Infrastructure Protection Plan Framework.
9:35 a.m. Asset-Based Infrastructure Protection.
10:35 a.m. Systems-Based Infrastructure Protection.
12:15 p.m. Cross-Sector Dependencies and Interdependencies.
1:15 p.m. Regional Implementation of the National Infrastructure Protection Plan.
2:15 p.m. The National Infrastructure Protection Plan Partnership Framework: Assessment and Our Path Forward.
3:15 p.m. Perspective from The Hill: The National Infrastructure Protection Plan Partnership Framework.
3:45 p.m. Closing Remarks.
4 p.m. Adjournment.

DATES: The Critical Infrastructure Partnership Advisory Council will meet Wednesday, July 30, 2008. For additional information, please consult the CIPAC Web site, *http://www.dhs.gov/cipac*, or contact the CIPAC Secretariat by phone at 703–235–3999 or by e-mail at *cipac@dhs.gov*.

ADDRESSES: The meeting will be held in Salons III and IV of the Grand Ballroom of the J.W. Marriott, 1331 Pennsylvania Avenue, Washington, DC 20004. While we will be unable to accommodate oral comments from the public, written comments may be sent to Nancy Wong, Department of Homeland Security, National Protection and Programs Directorate, Washington, DC 20528. Comments must be identified by DHS–2008–0074 and may be submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: cipac@dhs.gov*. Include the docket number in the subject line of the message.
- *Fax:* 703–235–3055
- *Mail:* Nancy Wong, Department of Homeland Security, National Protection and Programs Directorate, Washington, DC 20528.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the Critical Infrastructure Partnership Advisory Council, go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Nancy Wong, CIPAC Designated Federal Officer, Department of Homeland Security, Washington, DC 20528; telephone 703–235–3999.

Dated: July 22, 2008.

Nancy Wong,

Designated Federal Officer for the CIPAC.

[FR Doc. E8–17374 Filed 7–29–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

RIN 1652–ZA12

Registered Traveler Interoperability Pilot Program

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice.

SUMMARY: The Transportation Security Administration (TSA) published a notice in the **Federal Register** on November 24, 2006, to establish the Service Provider Key Personnel Fee and the Registered Traveler Interoperability Pilot Participant Fee for the Registered Traveler Interoperability Pilot (RTIP).

Under the RTIP, passengers who voluntarily provided biometric and biographic information to TSA, or a TSA agent, and successfully completed a TSA security threat assessment, could obtain expedited security screening at participating airports. TSA implemented the fees announced in the November 24, 2006, notice to compensate TSA for the cost of performing security threat assessments on RTIP applicants and related program operation costs. Today, TSA is announcing the completion of the RTIP and termination of the TSA RTIP fees. TSA will continue to work with private sector partners as they continue to develop the Registered Traveler business as a private sector enterprise. That business is no longer limited to the 10–20 locations outlined in the November 24, 2006 **Federal Register** notice.

DATES: This notice is effective July 30, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Cowley, Director, Aviation Credentialing, Office of Transportation Threat Assessment and Credentialing (TTAC), TSA–19, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; facsimile (571) 227–1936; e-mail: *Registered.Traveler@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Notice Document

You can get an electronic copy using the Internet by—

(1) Accessing the Government Printing Office's Web page at: *http://www.gpoaccess.gov/fr/index.html;* or

(2) Visiting TSA's Security Regulations Web page at *http://www.tsa.gov* and accessing the link for ''Research Center'' at the top of the page.

In addition, copies are available by writing the individual in the **FOR FURTHER INFORMATION CONTACT** section.

I. Background

The Aviation and Transportation Security Act (ATSA), Public Law 107–71 (115 Stat. 597, 613, Nov. 19, 2001), sec. 109(a)(3), authorizes the Transportation Security Administration (TSA) to ''establish requirements to implement trusted passenger programs and use available technologies to expedite security screening of passengers who participate in such programs, thereby allowing security screening personnel to focus on those passengers who should be subject to more extensive screening.'' To enable a nationwide private sector Registered Traveler (RT) business opportunity, TSA has been working, and continues to work, with private sector providers of RT to harmonize technologies and business processes with government credentialing and screening standards and procedures to improve commercial air travel while continuing to safeguard transportation and national security.

RT has been developed through a series of three pilots. TSA announced the first pilot, the Registered Traveler Pilot Program, on July 7, 2004. The Registered Traveler Pilot Program was a federally-managed pilot conducted at five designated airports [1] that established biometrics use in identity verification and determined baselines for public acceptance. The second pilot program, named the Private Sector Known Traveler, tested the feasibility of implementing RT through a public/private partnership at a single airport. The third pilot, the RTIP, further tested and evaluated this type of trusted passenger program. The RTIP also introduced interoperability among participating airports/air carriers and operated with larger populations.

RT is a private sector business opportunity that currently is supported and overseen by TSA, with distinct roles and responsibilities for each participating entity. Under the RTIP and its predecessor pilots, TSA was responsible for setting program standards and conducting the security threat assessment, physical screening at TSA checkpoints and certain forms of oversight. The private sector was responsible for enrollment, identity verification, concierge and related services.

Under the RTIP enrollment process, RT applicants voluntarily provided RT Sponsoring Entities (*i.e.*, participating airport authorities or air carrier operators) and Service Providers (*i.e.*, a private sector vendor chosen by a Sponsoring Entity to implement RT as its agent) with biographic and biometric data needed for TSA to conduct the security threat assessment and determine eligibility. The TSA security threat assessment included checking each applicant's biographic information against terrorist-related, law enforcement, and immigration databases that TSA maintains or uses. RT applicants who received an ''approved'' security threat assessment result were authorized to become program participants.

Once a traveler qualified as an approved participant, the traveler was able to take advantage of the expedited screening process available exclusively through the RT program. At the airport screening checkpoint, RT participants entered a designated RT lane and verified their identity through biometric identity verification technologies. This process also ensured that the individual was an ''approved'' RT participant. After the identity and current status of the RT participant were verified, the participant entered the checkpoint lane identified for registered travelers and underwent the applicable TSA checkpoint screening. These processes will remain largely unchanged with the end of the RTIP and expansion of RT. They should provide the basis to expedite the RT participants' entrance into the screening process.

In evaluating the RTIP, TSA reached several conclusions that led to the termination of the TSA fee being announced today. First, current technology is insufficient to allow anyone, even travelers who provide biographic and biometric information and undergo a TSA security threat assessment, to bypass the minimum screening procedures at airport security checkpoints. For example, one service provider suggested that a device to scan shoes replace the requirement that the passenger remove his or her shoes. TSA tested the shoe scanner and concluded that it was less effective than existing x-ray capabilities which require a TSA officer to monitor materials to detect potential explosive or other dangerous devices in shoes, purses or other carry-on materials during TSA screening.

Second, TSA concluded that an individual's successful completion of a TSA threat assessment did not eliminate the possibility that the individual might initiate an action that threatens the lives of other passengers. Therefore, screening of these individuals should remain the same as screening of other passengers.

Third, while effective identity verification is a critically important element in a multi-layered approach to aviation security, RT is not a stand-alone security program. Finally, the interoperability of the RT is a beneficial element. RT Service Providers have demonstrated the ability to verify technically and recognize revocation of each other's cards. Based on these observations and conclusions, TSA has concluded the RTIP and has decided to focus the government role in relation to RT on its identity verification benefits.

II. Evolution of Registered Traveler

A. Roles and Responsibilities Under RT

With the conclusion of the RTIP, TSA is announcing modifications to RT.

[1] Minneapolis-St. Paul Airport, Los Angeles International Airport, George Bush International Airport/Houston, Boston Logan International Airport, and Ronald Reagan Washington National Airport.

These modifications include changes to TSA's role. TSA will set security standards for RT through modifications to the Sponsoring Entities' security programs. TSA will continue to exercise oversight of the Sponsoring Entities to ensure compliance with the security standards. These security standards will be similar in nature to the security standards currently in place for the RTIP and will enhance security features. However, TSA will no longer set other standards for, or conduct security threat assessments of, RT applicants. TSA will also continue its screening operations at the security checkpoint. RT participants will continue to be screened according to the standard TSA screening process and vetted against the No Fly and Selectee Lists of the Terrorist Screening Database.

The private sector will have the primary role in RT's future. Sponsoring Entities will continue to select their Service Providers and enter into a contractual relationship with them. The Sponsoring Entities will continue to be responsible for overseeing and monitoring their Service Providers, and for ensuring their compliance with the requirements of RT. These requirements are part of the Sponsoring Entities' security programs.

As the vendors for the Sponsoring Entities, the Service Providers will continue to provide enrollment and verification services. As discussed in further detail in Section II.B, Sponsoring Entities and Service Providers may elect to develop and implement an enhanced identity verification process. Sponsoring Entities and Service Providers may also develop other benefits and innovations for RT provided that the benefits and innovations are not inconsistent with the Sponsoring Entities' security programs.

RT benefits will continue to be determined locally and may vary by location. It will be the responsibility of the private sector Service Providers and Sponsoring Entities (airports or air carriers) to fashion each arrangement, consistent with the TSA approved standards for Sponsoring Entities' security programs.

RT participants voluntarily provide information to Sponsoring Entities and Service Providers as part of an enhanced identity verification business opportunity. RT participants may receive benefits such as using designated security lanes or expedited access to security screening. These benefits are determined and modified at the discretion of the Sponsoring Entities and their Service Providers.

B. Identity Verification Benefits of Registered Traveler

The name on the individual's boarding pass is the name that is used to perform watch list matching. RT can be effective in verifying that the passenger who is traveling is actually the person whose name is on the boarding pass. RT represents a private-sector alternative by which travelers can establish their identities, and biographically and biometrically link that identity to their RT cards.

RT Service Providers perform identity verification as part of the RT enrollment process. The verification process at the airport RT lanes confirms that the individual who is presenting the RT card is the individual who has established his or her identity during the enrollment process. Together, the RT enrollment and verification processes perform the main security function of the TSA Travel Document Checker (TDC) at the screening checkpoint, which is to verify the identity of travelers before they enter the sterile area. Thus RT participants may bypass the TDC if their RT cards contain the appropriate biometric and biographic information.

New Sponsoring Entities that wish to offer RT services at their respective airports will need to demonstrate that their enrollment Service Providers adopt a process that adequately establishes a RT participant's identity. This process will be similar to the process in place for the RTIP. Because identity verification is an important component of TSA's layered security approach, airport operators and aircraft operators who wish to begin to offer RT service after the effective date of this notice must adopt an amendment to their security program that satisfies the identity verification requirements and all other RT requirements prior to commencing RT operations at their respective airports.

Sponsoring Entities that currently have RT operations under the RTIP may continue with their RT operations under their existing security program amendments consistent with this notice.

C. Transition Period

TSA required interoperability as part of the RTIP with the understanding that the Service Providers would negotiate with each other to establish any fees they would charge each other to implement interoperability.

A twelve-month transition period will be provided following the effective date of this notice where Service Providers must accept all valid RT cards at all locations, ensuring that RT participants who recently joined an RT program will have the interoperability benefits for which they enrolled. Thereafter, RT Service Providers must continue to be able to technically verify and recognize revocation of each other's cards, but they will not be required to guarantee interoperability. TSA is leaving it to the private sector (*i.e.*, Sponsoring Entities, Service Providers, customers, and other interested stakeholders) to determine how to address acceptance, including the possibility of transfer fees.

D. Rescission of Registered Traveler Interoperability Pilot Fees

TSA has determined that the current security threat assessment largely duplicates the watch list matching that is conducted on all travelers every time they fly. The other parts of the TSA are not core elements in passenger security and will no longer be required. Because TSA will no longer be conducting security threat assessments on RT participants, TSA will no longer collect a security threat assessment fee. Additionally, with the conclusion of the RTIP, TSA will no longer collect a fee to cover the cost of the RTIP. Thus, the RTIP Participant fee of $28 is rescinded as of the effective date of this notice. After that date, TSA will no longer conduct security threat assessments on RT participants.

Additionally, TSA will no longer collect the Service Provider Key Personnel Fee. Service Providers, however, are the Sponsoring Entities' contractors. Thus, Service Providers' employees who perform certain functions, such as enrollment, must undergo a background check in accordance with TSA's existing practices covering airport-sponsored vendors, including the collection of fees.

If a Sponsoring Entity decides to create a separate, dedicated screening lane for RT participants or institute a process that requires Transportation Security Officer support beyond what TSA is currently providing for these passengers, TSA will negotiate the exact level of support and the fee necessary to match the costs of this support with the Sponsoring Entity. TSA will then charge the Sponsoring Entity the fee based upon the cost of providing the additional services and support.

TSA continues to encourage private-sector innovation that can expedite the screening process without sacrificing security results—such as the anticipated development of a ''laptop bag''—and remains committed to testing such technologies in both laboratory and live settings. However, TSA will endeavor to deploy such proven technologies at all checkpoints nationwide, not just for premium travelers or those who pay additional fees.

As stated in the notice, Registered Traveler Interoperability Fees, 71 FR 67899 (Nov. 24, 2006), TSA will not refund any TSA RT fees collected prior to the effective date of this notice.

Issued in Arlington, Virginia, on July 25, 2008.

Gale D. Rossides,

Deputy Administrator.

[FR Doc. E8–17493 Filed 7–29–08; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–602, Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–602, Application by Refugee for Waiver of Grounds of Excludability; OMB No. 1615–0069.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on May 13, 2008, at 73 FR 27548 allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until August 29, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *oira_submission@omb.eop.gov*.

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0069 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application by Refugee for Waiver of Grounds of Excludability.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–602. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. This form is necessary to establish eligibility for waiver of excludability based on humanitarian, family unity, or public interest.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 2,500 responses at 15 minutes (.25) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 625 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://www.regulations.gov/search/index.jsp.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: July 22, 2008.

Stephen Tarragon,

Management Analyst, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E8–17433 Filed 7–29–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–914, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form I–914 and Supplements A and B, Application for T Nonimmigrant Status; Application for Immediate Family Member of T–1 Recipient; and Declaration of Law Enforcement Officer for Victim of Trafficking in Persons; OMB Control No. 1615–0099.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until September 29, 2008.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail, please add the OMB Control Number 1615–0099 in the subject box.

During this 60-day period, USCIS will be evaluating whether to revise the Form I–914. Should USCIS decide to revise the Form I–914 it will advise the public when it publishes the 30 day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to the Form I–914.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application for T Nonimmigrant Status; Supplement A: Application for Immediate Family Member of T–1 Recipient; and Supplement B: Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–914. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. This application permits victims of severe forms of trafficking and their immediate family members to demonstrate that they qualify for temporary nonimmigrant status pursuant to the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), and to receive temporary immigration benefits.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Form I–914 (500 responses at 2.25 hours per response); Supplement A (500 responses at 1 hour per response); Supplement B (200 responses at .5 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,725 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/search/index.jsp.*

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: July 25, 2008.

Sunday Aigbe,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E8–17435 Filed 7–29–08; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–921–08–1320–EL–P; MTM 97988]

Notice of Coal Lease Application—MTM 97988—Bull Mountain Coal Properties

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice.

SUMMARY: This is Notice of Bull Mountain Coal Properties Coal Lease Application MTM 97988 for certain coal resources within the Bull Mountain Mine. The land included in Coal Lease Application MTM 97988 is located in Musselshell County, Montana, and is described as follows:

T. 6 N., R. 27 E., P.M.M.
Sec. 4: Lot 1, S½NE¼, SE¼NW¼, S½
Sec. 8: NE¼, NE¼NW¼, S½NW¼, S½
Sec. 10: W½NE¼, SE¼NE¼, NW¼, S½
Sec. 14: SW¼NE¼, NW¼, S½
Sec. 22: W½, SE¼

2,679.86 acres—Musselshell County, Montana.

The 2,679.86 acre tract contains an estimated 61.4 million tons of in-place coal reserves.

The application will be processed in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181, *et seq.*), and the implementing regulations at 43 CFR 3400. A decision to allow leasing of the coal reserves in said tract will result in a competitive lease sale to be held at a time and place to be announced through publication pursuant to 43 CFR 3422.

Notice of Availability: The application is available for review between the hours of 9 a.m. and 4 p.m. at the Bureau of Land Management, Montana State Office, 5001 Southgate Drive, Billings, Montana 59101, and the Bureau of Land Management, Billings Field Office, between the hours of 9 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Rebecca Spurgin, Coal Coordinator, at telephone 406–896–5080, Bureau of Land Management, Montana State Office, 5001 Southgate Drive, Billings, Montana 59107–6800.

Dated: July 22, 2008.

Edward L. Hughes,

Acting Chief, Branch of Solid Minerals.

[FR Doc. E8–17197 Filed 7–29–08; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Notice of Royalty-in-Kind (RIK) Eligible Refiner Program Continuation and Sale

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of RIK Eligible Refiner Program Continuation and Sale.

SUMMARY: On behalf of the Secretary of the Interior (Secretary), the Minerals Management Service (MMS) has made a determination that sufficient need exists among eligible refining companies to justify taking royalty oil in kind and offering this oil for sale to eligible refiners. As a result of this determination, a sale of Federal royalty oil for eligible refiners will be held the end of July 2008. Regarding this sale of Federal royalty oil, please reference the RIK Invitation for Offer, which is located at *http://www.mrm.mms.gov/RIKweb/SmallRefiners.htm.*

DATES: The sale will be held on August 5–6, 2008.

FOR FURTHER INFORMATION, CONTACT: Colin Bosworth, at (303) 231–3186, FAX (303) 231–3846, or e-mail *colin.bosworth@mms.gov.*

SUPPLEMENTARY INFORMATION: The MMS published a notice in the **Federal Register** on January 16, 2008 (73 FR 2938) seeking comments on eligible refiners' experience in gaining access to adequate supplies of crude oil at equitable prices. The MMS received comments from five eligible refiners and one major oil company. Three of the small refiners responded that there was a need to continue the RIK eligible refiner crude oil program.

Under 30 CFR 208.4(a), the Secretary determines whether eligible refiners have access to adequate supplies of crude oil at equitable prices.

On behalf of the Secretary, the MMS, based on its analysis, has decided at this time to continue the sale of royalty crude oil to eligible refiners. The MMM's determination is based on the fact that eligible refiners have expressed real concerns about the lack of stable access to the marketplace and the significant volatility of oil prices. Eligible refiners also continue to play a prominent role in providing jet fuel to the U.S. Department of Defense, which makes the eligible refiner oil program an important contributor to national security.

Dated: July 11, 2008.

Gregory J. Gould,

Associate Director for Minerals Revenue Management.

[FR Doc. E8–17388 Filed 7–29–08; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0063

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed approval for the continued collection of information for 30 CFR part 870 and the OSM–1 Form. This collection was previously approved by the Office of Management and Budget (OMB) and assigned control number 1029–0063.

DATES: Comments on the proposed information collection must be received by September 29, 2008, to be assured of consideration.

ADDRESSES: Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 202–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov*.

FOR FURTHER INFORMATION CONTACT: To request a copy of the information collection package contact John Trelease at the address listed in **ADDRESSES**.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies an information collection that OSM will be submitting to OMB for extension. This collection is contained in 30 CFR part 870, Abandoned Mine Reclamation Fund Fee Collection and Coal Production Reporting and the form it implements, the OSM–1, Coal Reclamation Fee Report.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden and respondents. OSM will request a 3-year term of approval for each information collection activity.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will be included in OSM's submissions of the information collection requests to OMB.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The following information is provided for the information collection: (1) Title of the information collection; (2) OMB control number; (3) summary of the information collection activity; and (4) frequency of collection, description of the respondents, estimated total annual responses, and the total annual reporting and recordkeeping burden for the collection of information.

Title: 30 CFR Part 870—Abandoned Mine Reclamation Fund—Fee Collection and Coal Production Reporting.

OMB Control Number: 1029–0063.

Summary: The information is used to maintain a record of coal produced for sale, transfer, or use nationwide each calendar quarter, the method of coal removal and the type of coal, and the basis for coal tonnage reporting in compliance with 30 CFR part 870 and section 401 of Public Law 95–87. Individual reclamation fee payment liability is based on this information. Without the collection of information OSM could not implement its regulatory responsibilities and collect the fee.

Bureau Form Number: OSM–1.

Frequency of Collection: Quarterly.

Description of Respondents: Coal mine permittees.

Total Annual Responses: 11,192.

Total Annual Burden Hours: 2,462.

Dated: July 23, 2008.

John R. Craynon,

Division of Regulatory Support.

[FR Doc. E8–17328 Filed 7–29–08; 8:45 am]

BILLING CODE 4310–05–M

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearings of the Judicial Conference Committees on Appellate, Bankruptcy, Civil and Criminal Rules, and the Rules of Evidence

AGENCY: Judicial Conference of the United States, Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence.

ACTION: Notice of Proposed Amendments and Open Hearings.

SUMMARY: The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules, and the Rules of Evidence have proposed amendments to the following rules:

Appellate Rules: 1, 29, and Form 4.

Bankruptcy Rules: 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, and 9001, and New Rules 1004.2, and 5012.

Civil Rules 26 and 56.

Criminal Rules 5, 12.3, 15, 21, and 32.1.

Evidence Rule 804.

The text of the proposed rules amendments and new rules and the accompanying Committee Notes can be found at the United States Federal Courts' Home Page at *http://www.uscourts.gov/rules.*

The Judicial Conference Committee on Rules of Practice and Procedure submits these proposed rules amendments and new rules for public comment. All comments and suggestions with respect to them must be place in the hands of the Secretary as soon as convenient and, in any event, not later than February 17, 2009. All written comments on the proposed rule amendments can be sent by one of the following three ways: by overnight mail to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, Washington, DC 20544; by electronic mail at *http://www.uscourts.gov/rules;* or by facsimile to Peter G. McCabe at (202) 502–1766. In accordance with established procedures all comments submitted on the proposed amendments are available to public inspection.

Public hearings are scheduled to be held on the amendments to:

- Appellate Rules in Washington, DC, on January 30, 2009, and in New Orleans, LA, on February 11, 2009;
- Bankruptcy Rules in New York, NY, on January 23, 2009, and in San Francisco, CA, on February 6, 2009;
- Civil Rules in Washington, DC, on November 17, 2008, in San Antonio, TX, on January 14, 2009, and in San Francisco, CA, on February 2, 2009;
- Criminal Rules in Los Angeles, CA, on January 16, 2009, and in Dallas, TX, on February 9, 2009; and
- Evidence Rules in San Antonio, TX, on January 13, 2009, and in Atlanta, GA, on January 26, 2009.

Those wishing to testify should contact the Committee Secretary at the above address in writing at least 30 days before the hearing.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United State Courts, Washington, DC 20544, Telephone (202) 502–1820.

Dated: July 25, 2008.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. E8–17432 Filed 7–29–08; 8:45 am]

BILLING CODE 2210–55–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

July 25, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of each ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Darrin King on 202–693–4129 (this is not a toll-free number) / e-mail: *king.darrin@dol.gov.*

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, *Attn:* Bridget Dooling, OMB Desk Officer for the Employment Standards Administration (ESA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316 / Fax: 202–395–6974 (these are not toll-free numbers), E-mail: *OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Employment Standards Administration.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: Miner's Claim for Benefits Under the Black Lung Benefits Act and Employment History.

OMB Control Number: 1215–0052.

Form Numbers: CM–911 and CM–911A.

Total Estimated Number of Respondents: 7,500.

Total Estimated Annual Burden Hours: 5,250.

Total Estimated Annual Cost Burden: $1,449.

Affected Public: Individuals or Households.

Description: The Form CM–911 is the standard application filed by the miner for benefits under the Black Lung Benefits Act of 1977 and subsequent amendments (30 U.S.C. 901 *et seq.*). The applicant lists the coal miner's work history on the CM–911A which helps to establish if a miner currently or formerly worked in the nation's coal mines. For additional information, see related notice published at 73 FR 23274 on April 29, 2008.

Agency: Employment Standards Administration.

Type of Review: Extension without change of a currently approved collection.

Title of Collection: Application of the Employee Polygraph Protection Act.

OMB Control Number: 1215–0170.

Form Numbers: WH–1481.

Total Estimated Number of Respondents: 164,000.

Total Estimated Annual Burden Hours: 68,739.

Total Estimated Annual Cost Burden: $0.

Affected Public: Business or other for-profit and not-for-profit institutions.

Description: The U.S. Department of Labor, Wage and Hour Division (WHD) uses the subject information collection (third-party disclosures and recordkeeping) requirements to ensure that individuals subjected to polygraph testing receive the rights and protections provided by the Employee Polygraph Protection Act of 1988. For additional information, see related notice published at 73 FR 23273 on April 29, 2008.

Darrin A. King,

Departmental Clearance Officer.

[FR Doc. E8–17451 Filed 7–29–08; 8:45 am]

BILLING CODE 4510–CF–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,515]

Maytag Corporation, a Wholly Owned Subsidiary of Whirlpool Corporation, Newton Division, Including On-Site Leased Workers of Henkel Corp., Randstad Corp., Ryerson Steel, Chem-Tool, Barnes Electric, Mid Iowa Tools, Kimco Janitorial, Johnson Controls, and Baker Electric, Newton, IA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on December 26, 2006, applicable to workers of Maytag Corporation, a wholly owned subsidiary of Whirlpool Corporation, Newton Division, Newton, Iowa. The notice was published in the **Federal Register** on January 16, 2007 (72 FR 1770). The certification was amended on July 26, 2007 to include numerous on-site leased firms. The notice was published in the **Federal Register** on August 2, 2007 (72 FR 42434).

At the request of a petitioner, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of laundry products (clothes washers and dryers) and are not separately identifiable by specific product.

Findings show that the above mentioned leased workers working on-site at the subject firm were not included in the original decision; therefore, the impact date will read November 16, 2005, one year prior to the date of the petition. The Maytag workers will retain the same impact date of December 24, 2006 because a previous certification (TA–W–56,088) expired on December 23, 2006.

The intent of the Department's certification is to include all workers employed at Maytag Corporation, a wholly owned subsidiary of Whirlpool Corporation, Newton Division, Newton, Iowa who were adversely affected by increased imports.

The amended notice applicable to TA–W–60,515 is hereby issued as follows:

All workers of Maytag Corporation, a wholly owned subsidiary of Whirlpool Corporation, Newton Division, Newton, Iowa, who became totally or partially separated from employment on or after December 24, 2006, through December 26, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974,

and

All leased workers from Henkel Corp., Randstad Corp., Ryerson Steel, Chem-Tool, Barnes Electric, Mid Iowa Tools, Kimco Janitorial, Johnston Controls, and Baker Electric, working on-site at Maytag Corporation, a wholly owned subsidiary of Whirlpool Corporation, Newton Division, Newton, Iowa, who became totally or partially separated from employment on or after November 16, 2005, through December 26, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 22nd day of July 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–17380 Filed 7–29–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,807]

NothelferGilman, Incorporated, Currently Known as ThyssenKrupp Drauz Nothelfer NA, Inc., Formerly Known as Gilman Engineering and Manufacturing Company, Including On-Site Leased Workers From Advanced Project Services, LLC, Aerotek, Inc., Human Capital Solutions, Impact Engineering Solutions, Inc., Techstaff of Milwaukee, Inc. and Manpower, Inc., Janesville, WI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on March 8, 2007, applicable to workers of NothelferGilman, Inc., formerly known as Gilman Engineering and Manufacturing Company, including on-site leased workers from Advanced Project Services, LLC, Aerotek, Inc., Human Capital Solutions, Impact Engineering Solutions, Inc., and Techstaff of Milwaukee, Inc., Janesville, Wisconsin. The notice was published in the **Federal Register** on March 22, 2007 (72 FR 13528).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of assembly and welding systems.

New information shows that following a corporate decision in August 2007, NothelferGilman, Incorporated is currently known as ThyssenKrupp Drauz Nothelfer NA Inc. Information also shows that leased workers of Manpower, Inc. were employed on-site at the Janesville, Wisconsin location of NothelferGilman, Incorporated, formerly known as Gilman Engineering and Manufacturing Company. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to show that NothelferGilman, Incorporated is currently known as ThyssenKrupp Drauz Nothelfer NA Inc. and to include leased workers of Manpower, Inc. working on-site at the Janesville, Wisconsin location of the subject firm.

The intent of the Department's certification is to include all workers employed at NothelferGilman, Incorporated, currently known as ThyssenKrupp Drauz Nothelfer NA Inc., formerly known as Gilman Engineering and Manufacturing Company, Janesville, Wisconsin, who were adversely affected by increased imports of assembly and welding systems.

The amended notice applicable to TA–W–60, 807 is hereby issued as follows:

All workers of NothelferGilman, Inc., currently known as ThyssenKrupp Drauz Nothelfer NA, Inc., formerly known as Gilman Engineering and Manufacturing Company, including on-site leased workers of Advanced Project Services, LLC, Aerotek, Inc., Human Capital Solutions, Impact Engineering Solutions, Inc., Techstaff of Milwaukee, Inc. and Manpower, Inc., Janesville, Wisconsin, who became totally or partially separated from employment on or after January 22, 2007, through March 8, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 22nd day of July 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–17381 Filed 7–29–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of July 14 through July 18, 2008.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

TA–W–63,589; Delfingen US, Inc., San Antonio, TX: June 24, 2007.

TA–W–63,317; Union Carbide Corporation, Subsidiary of The Dow Chemical Company, South Charleston, WV: May 5, 2007.

TA–W–63,604; Destron Fearing, Animal Applications Division, South St. Paul, MN: June 26, 2007.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–63,402; NTN–BCA Corporation, Subsidiary of NTN–USA, Lititz, PA: May 18, 2007.

TA–W–63,560; Artisans, Inc., Glen Flora, WI: May 4, 2008.

TA–W–63,372; Frank L. Wells Company/ Wellsco Controls, Inc., Kenosha, WI: May 12, 2007.

TA–W–63,373; The Stinehour Press, LLC, Lunenburg, VT: May 12, 2007.

TA–W–63,470; Intelicoat Technologies, Portland, OR: June 2, 2007.

TA–W–63,509; Robin Manufacturing USA, Inc., Express Personnel Services, Hudson, WI: June 4, 2007.

TA–W–63,527; Utlx Manufacturing, Inc., East Chicago, IN: May 29, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–63,492; Beverage Air, Division of Carrier Corporation, Spartanburg, SC: June 6, 2007.

TA–W–63,535; Leviton Manufacturing Company, Jefferson Plant, Jefferson, NC: June 12, 2007.

TA–W–63,538; Plastech Engineered Products, Gallatin, TN: June 5, 2007.

TA–W–63,577; Russell Corporation, Coosa River Textiles, Knitting, Dyeing & Finishing, Wetumpka, AL: June 20, 2007.

TA–W–63,595; Connectivity Technologies, Inc., A Subsidiary of Methode Electronics, Assembly Division, Carrollton, TX: June 21, 2007.

TA–W–63,611; Ametek, Inc., Wilmington, MA: June 24, 2007.

TA–W–63,612; American Axle and Manufacturing, Cheektowaga

Facility, Adecco, Cheektowaga, NY: June 26, 2007.

TA–W–63,624; UFE, Inc., River Falls Molding Div., River Falls, WI: June 27, 2007.

TA–W–63,634; Wausau Paper Specialty Products, LLC, Paid by Mosinee Paper, Manpower, Jackson, MS: June 28, 2007.

TA–W–63,637; Hayes Lemmerz International—Georgia, Inc. Resource Mfg, Kelly Services & Chase Technical, Gainesville, GA: July 1, 2007.

TA–W–63,652; Brake Parts, Inc., Subsidiary of Affinia, Inc., Affinia Under Vehicle Group, Dallas, TX: June 16, 2007.

TA–W–63,659; Unilever Illinois Manufacturing, LLC, Food Solutions Division, Franklin Park, IL: July 9, 2007.

TA–W–63,520; American Dynamics, Access Control & Video Systems Division, San Diego, CA: June 6, 2007.

TA–W–63,474; Advertising Department of The Anderson Independent, Anderson, SC: May 23, 2007.

TA–W–63,499; Kincaid Furniture Company, Inc., Plant 1, Foothills Temporary Employment, Hudson, NC: May 18, 2008.

TA–W–63,499A; Kincaid Furniture Company, Inc., Corporate Office, Hudson, NC: May 18, 2008.

TA–W–63,575; Philips Consumer Lifestyles, Ledgewood, NJ: June 18, 2007.

TA–W–63,626; Mahle Engine Components USA, Inc., Manchester, MO: June 27, 2007.

TA–W–63,635; Robert Bosch, LLC, Aftermarket Division, Broadview, IL: June 27, 2007.

TA–W–63,646; Sorin Group USA, Inc, Excel Personnel, Arvada, CO: September 9, 2008.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–63,483; Southern Industrial Fabrics, Rossville, GA: June 5, 2007.

TA–W–63,597; Murpac of Indiana, LLC, Remington, IN: June 19, 2007.

TA–W–63,627; Chrysler, LLC, Toledo Machining Plant, Perrysburg, OH: June 26, 2007.

TA–W–63,686; Kelsey-Hayes Company, Braking and Suspension Division, Fenton, MO: July 11, 2007.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

TA–W–63,604; Destron Fearing, Animal Applications Division, South St. Paul, MN: June 26, 2007.

TA–W–63,589; Delfingen US, Inc., San Antonio, TX: June 24, 2007.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

TA–W–63,317; Union Carbide Corporation, Subsidiary of The Dow Chemical Company, South Charleston, WV: May 5, 2007.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–63,516; Morlite/Vista Lighting, Genlyte Group, Erie, PA.

TA–W–63,525; Overhead Door Corporation, Sectional Facility, Lewistown, PA.

TA–W–63,621; Valco Furniture USA, Inc., Malone, NY.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–63,116; Dott Manufacturing Company, Division of Dott Industries, Inc., Deckerville, MI.

TA–W–63,548; Colville Indian Precision Pine, Forest Products Division, Omak, WA.

TA–W–63,640; 3M Touch Systems, Subsidiary of 3M, Electro & Communications Division, Milwaukee, WI.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–63,586; EPCO LLC, Fremont, OH.

TA–W–63,633; Quest Diagnostics, Exam One Division, Creve Coeur, MO.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of July 14 through July 18, 2008. Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: July 23, 2008.

Erin Fitzgerald,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E8–17378 Filed 7–29–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 11, 2008.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 11, 2008.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 23rd day of July 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 7/14/08 and 7/18/08]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
63679	Stanley Furniture Company (Comp)	Lexington, NC	07/14/08	07/11/08
63680	Tower Automotive (UAW)	Clinton Twp, MI	07/14/08	07/11/08
63681	Invensys Controls (Comp)	Plain City, OH	07/14/08	07/11/08
63682	Artistics Plating and Metal Finishing, Inc. (Comp)	Anaheim, CA	07/14/08	07/11/08
63683	Numatech, Inc. (Comp)	Wixom, MI	07/14/08	07/10/08
63684	Orbeco-Hellige, Inc. (Comp)	Farmingdale, NY	07/14/08	07/08/08
63685	Accenture HR Services (Wkrs)	San Antonio, TX	07/14/08	07/11/08
63686	Kelsey-Hayes Company (Comp)	Fenton, MO	07/14/08	07/11/08
63687	International Wood LLC (Wkrs)	Weslaco, TX	07/14/08	07/11/08
63688	Royal Home Fashions—Plant 4 (Comp)	Henderson, NC	07/15/08	07/14/08
63689	Brazeway, Inc. (Comp)	Adrian, MI	07/15/08	07/02/08
63690	Burle Industries (IBEW)	Lancaster, PA	07/15/08	07/11/08
63691	NewPage Corporation—Niagara Mill (Comp)	Niagara, WI	07/15/08	07/11/08
63692	Firewire Surfboards (Wkrs)	San Diego, CA	07/15/08	07/02/08
63693	Classic Components Corporation (State)	Scottsdale, AZ	07/15/08	07/14/08
63694	Klaussner Furniture Industries, Inc. (Rep)	Asheboro, NC	07/15/08	07/14/08
63695	Tubular Metal Systems, LLC (Wkrs)	Pinconning, MI	07/15/08	07/14/08
63696	Johnson Controls Injection Molding, LLC (Comp)	Clarkston, MI	07/16/08	07/15/08
63697	MTD Southwest, Inc. (Comp)	Tempe, AZ	07/16/08	07/12/08
63698	Filtran, Inc. (Wkrs)	Ogdensburg, NY	07/16/08	07/07/08
63699	England, Inc. (Comp)	New Tazewell, TN	07/16/08	07/07/08
63700	NewPage Wisconsin Systems, Inc. (Comp)	Kimberly, WI	07/16/08	07/07/08
63701	CTS & I Millwork (Wkrs)	Rocky Mountain, VA	07/16/08	07/03/08
63702	Intermec Service Center (Wkrs)	Cedar Rapids, IA	07/16/08	07/15/08
63703	Armstrong Wood Products, Inc. (Comp)	Oneida, TN	07/16/08	07/11/08
63704	Parmelee Industries, Inc. (Wkrs)	Windsor, MO	07/16/08	07/11/08
63705	Border Apparel Laundry, Ltd (Comp)	El Paso, TX	07/16/08	07/15/08
63706	Carolina Wholesale Neon (Wkrs)	Mt. Airy, NC	07/16/08	07/07/08
63707	Alcoa Rockdale Operations (USW)	Barkdale, TX	07/17/08	07/14/08
63708	ABB, Inc's (State)	Mansfield, LA	07/17/08	07/16/08
63709	RFMD (RF Micro Devices) (Rep)	Greensboro, NC	07/17/08	07/09/08
63710	Citgo Lube and Wax Facility (State)	Lake Charles, LA	07/18/08	07/17/08

[FR Doc. E8–17377 Filed 7–29–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,624]

Fairchild Semiconductor International Mountain Top, Pennsylvania; Notice of Revised Determination on Remand

On April 18, 2008, the U.S. Court of International Trade (USCIT) remanded to the Department of Labor (Department) for further investigation the matter *Former Employees of Fairchild Semiconductor Corporation* v. *United States Secretary of Labor*, Court No. 06–00215.

In the January 11, 2006 petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA), an official of Fairchild Semiconductor International (the subject firm) alleged that production of ''discrete semiconductor devices'' at Fairchild Semiconductor International, Mountain Top, Pennsylvania (the subject facility) ''deteriorated because of a transfer of production'' abroad and that its customers are ''purchasing similar devices from other suppliers with locations in foreign countries.'' AR 3–4.

The initial investigation revealed that semiconductor wafers were produced at the subject facility during the relevant period, AR 27–28, 30, 42, that the subject facility shifted semiconductor wafer production to China, AR 27–28, and that the subject facility did not import semiconductor wafers after the shift. AR 7, 27, 59.

On February 28, 2006, the Department issued a negative determination regarding workers' eligibility to apply for TAA and ATAA for those workers of the subject facility. AR 41. The Department's Notice of determination was published in the **Federal Register** on March 24, 2006 (71 FR 14954). AR 55.

By application dated March 20, 2006, the petitioner requested administrative reconsideration of the Department's negative determination. The request for reconsideration stated that the subject facility produces ''semiconductor wafer chips'' and that semiconductor wafer chips are like or directly competitive with discrete semiconductor devices. AR 57.

By letter dated April 26, 2006, the Department dismissed the request for reconsideration, stating that discrete semiconductor devices are not like or directly competitive with semiconductor wafer chips and that the subject facility was not directly impacted by increased imports of semiconductor wafers. AR 60. The Department's Dismissal of the Application for Reconsideration was issued on May 1, 2006. AR 63. The Department's Notice of dismissal was published in the **Federal Register** on May 10, 2006 (71 FR 27292). AR 64.

In a letter filed with the USCIT on June 21, 2006, the Plaintiff sought judicial review. In the complaint, the Plaintiff alleged that the subject workers should be certified based on a shift of production followed by increased imports of articles, and that the workers should be certified because they are similarly situated as the workers covered by TA–W–53,335. The Department agreed to a remand to discuss this issue.

On remand, the Department determined that the subject workers produced semiconductor wafers and that increased imports of finished semiconductor devices cannot be the basis for certification of a petition applicable to workers engaged in the production of semiconductor wafers. In the determination, the Department stated that the denial was appropriate because the two articles are neither like nor directly competitive with each other. The Department issued a negative determination on remand on April 27, 2007. The Department's Notice of determination was published in the **Federal Register** on May 3, 2007 (72 FR 24613).

In its April 18, 2008 opinion, the USCIT stated that the Department's identification of the article at issue was confusing based on the record before the court, and, therefore, the Department's determination was not ''supported by substantial evidence.'' The USCIT thereupon remanded the case to the Department for further investigation as to whether there were increased imports during the relevant period of articles like or directly competitive with semiconductor wafers produced by the subject workers following the shift of production to a foreign country.

To address the USCIT's concerns in its April 18, 2008 order, the Department made efforts to better understand this industry and the operations of the subject facility during the second remand investigation. These efforts include further investigation of actual plant operations, SAR 22, 28–35, and researching the semiconductor wafer production process and the semiconductor chip production process. SAR 5–21, 39–42.

To clarify its findings in the second remand investigation, the Department sets forth the following terms and definitions:

- ''Wafer'' means the thinly sliced and polished disc, usually 4–8 inches in diameter and made of silicon, upon which semiconductor chips are made;
- ''Semiconductor chip'' (also referred to as a ''chip'') means the multiple layers of circuitry that are stacked on a wafer, with the wafer as the base layer;
- ''Semiconductor wafer'' means a wafer that has stacked on it hundreds or thousands of semiconductor chips (depending on the surface area of the wafer and the dimensions of each chip);
- ''Die'' means a semiconductor chip that is separated from the wafer upon which it was created; and
- ''Semiconductor device'' (also referred to as an integrated circuit) means that the die has been mounted on a lead-wire harness and packaged (the die in the harness is encapsulated, usually in plastic).

Based on the January 11, 2006 petition date, the relevant period for purposes of determining TAA eligibility in the case at hand is January 2005 through December 2005, and the article produced by the subject firm during January 2005 through December 2005 is the focus of the TAA investigation.

As part of its efforts to accurately identify the article produced at the Fairchild, Mountain Top, Pennsylvania facility during the relevant period, the Department received information from the company official who filed the petition (a senior human resources associate), SAR 22, the human resources manager of Fairchild, Mountain Top, Pennsylvania, SAR 22, Fairchild legal counsel, SAR 31, 34, 39 and the managing director of all operations at Fairchild, Mountain Top, Pennsylvania. SAR 34.

According to the senior human resources associate, the subject facility produced semiconductor chips in 8-inch wafer form. The senior human resources associate further stated that he believes that the subject facility produced semiconductor wafers and semiconductor chips because each chip on the wafer is fully functional as designed. This individual also stated that semiconductor wafers produced at the subject facility are sent to Asia. SAR 22.

According to the human resources manager of Fairchild, Mountain Top, Pennsylvania, the subject facility produced 8-inch semiconductor wafers bearing semiconductor chips. The human resources manager further stated that because the wafer becomes part of the semiconductor chip, the terms semiconductor wafers and semiconductor chip are interchangeable. This official also stated that the subject facility only produced semiconductor wafers and not semiconductor devices as the semiconductor wafers are sent to Asia to be cut into die and packaged. SAR 22.

In efforts to reconcile the seemingly contradictory statements by the senior human resources associate and the human resources manager, the Department contacted Fairchild's legal counsel for clarification. SAR 23–33. Fairchild legal counsel sent the Department a link to an Internet site that describes the article produced at the subject facility. SAR 39. Legal counsel also requested that the managing director of operations at Fairchild, Mountain Top, Pennsylvania, identify what activities took place at the subject firm during the relevant period. SAR 34. This individual was directly involved in the manufacturing of these products and has the most experience and expertise in the actual production line and the products manufactured. SAR 34.

According to the managing director, only steps 8, 9, and 10 as described in the pamphlet ''HOW TO MAKE AN INTEGRATED CIRCUIT: A step-by-step guide for the serious do-it-yourselfer'' were done at the subject facility during the relevant period. SAR 34, 37–38. As found in the second remand investigation, the process at the subject facility starts with a ''wafer'' as above defined.

At the end of this process (steps 8–10 of the ''HOW TO MAKE AN INTEGRATED CIRCUIT'' pamphlet), SAR 37–38, the subject facility has produced a ''semiconductor wafer'' which may contain hundreds or thousands of individual ''chips'' as indicated by the managing director. SAR 34, 37–38. Because the managing director is fully knowledgeable about the activities that took place at the subject facility during the relevant period and about the semiconductor production process, during this remand investigation, the Department relied on facts provided by the managing director in determining that, during the relevant period, the subject facility produced semiconductor wafers.

The Department also considered in the second remand investigation whether that shift of production could provide a basis for certification of the petitioning workers even though the subject facility did not import semiconductor wafers after that production shift.

In order for a group of workers to meet the certification requirements under Section 222(a)(1) and Section 222(a)(2)(B) of the Trade Act of 1974, as amended, the Department must determine that the following was satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States; or

2. The country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Because semiconductor wafer production shifted from the subject facility to China, a country that does not fall within subparagraphs C.1. or C.2. above, the only issue at hand is whether, following the shift of production abroad, there has been or is likely to be an increase of imports of articles like or directly competitive with the semiconductor wafers produced by the subject firm or subject facility.

During the second remand investigation, the Department obtained new information which revealed that, after the subject firm shifted semiconductor wafer production from the subject facility to China, the subject firm is likely to import semiconductor wafers that are like those produced at the subject facility. This fact was revealed during the investigation of petition TA–W–63,121 (Fairchild Semiconductor Corporation, Wafer Sort Department, Including On-Site Leased Workers from Manpower, South Portland, Maine; issued May 20, 2008; published in the **Federal Register** on June 3, 2008 at 73 FR 31716). As such, the Department determines that following the shift of production to China, the subject firm is likely to import semiconductor wafers that are like those produced by the subject workers during the relevant period.

Based on the aforementioned information, the Department has determined that there was a shift in production by the subject firm of articles like or directly competitive with the semiconductor wafers produced by the subject facility to a foreign country, and that, following the shift of production, there was a likely increase in imports by the subject firm of articles that are like or directly competitive with the semiconductor wafers produced at the subject facility.

In accordance with Section 246 the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department herein presents the results of its investigation regarding certification of eligibility to apply for ATAA. The Department has determined in this case that the group eligibility requirements of Section 246 have been met.

A significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful review of the facts generated through the second remand investigation, I determine that there was a total or partial separation of a significant number or proportion of workers at the subject facility, and that there was a shift in production to a foreign country followed by likely increased imports by the subject firm of articles like or directly competitive with semiconductor wafers produced at the subject facility.

In accordance with the provisions of the Act, I make the following certification:

All workers of Fairchild Semiconductor International, Mountain Top, Pennsylvania, who became totally or partially separated from employment on or after January 11, 2005, through two years from the issuance of this revised determination, are eligible to apply for Trade Adjustment Assistance under Section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 22nd day of July 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–17379 Filed 7–29–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,590]

General Fibers & Fabrics, LaGrange, GA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 24, 2008 in response to a worker petition filed by a company official on behalf of workers at General Fibers and Fabrics, LaGrange, Georgia.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 21st day of July 2008.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–17382 Filed 7–29–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,606]

Lakeland Mold Co. Stow, OH; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on June 27, 2008, in response to a worker petition filed by a company official on behalf of workers at Lakeland Mold Co., Stow, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 22nd day of July 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–17376 Filed 7–29–08; 8:45 am]

BILLING CODE 4510–FN–P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

The United States Institute for Environmental Conflict Resolution; Agency Information Collection Activities: Submission for OMB Review; Comment Request: See List of Evaluation Related ICRs in Section A

AGENCY: Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, U.S. Institute for Environmental Conflict Resolution.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act and supporting regulations, this document announces that the U.S. Institute for Environmental Conflict Resolution (the U.S. Institute), part of the Morris K. Udall Foundation, is submitting to the Office of Management and Budget (OMB) seven Information Collection Requests (ICRs). Six of the seven ICRs are for revisions to currently approved collections due to expire 09/30/2008 (OMB control numbers 3320–0003, 3320–0004, 3320–2005, 3320–0006, 3320–0007 and 3320–0009). One ICR pertains to a new collection request. The seven ICRs are being consolidated under a single filing to provide a more coherent picture of information collection activities designed primarily to measure performance. The proposed collections are necessary to support program evaluation activities. The collection is expected neither to have a significant economic impact on respondents, nor to affect a substantial number of small entities. Approval is being sought for each ICR separately, and information collection will begin for each program area once OMB has approved the respective ICR. The U.S. Institute published a **Federal Register** notice on March 20, 2008, 73 FR, pages 15007–15009, to solicit public comments for a 60-day period. The U.S. Institute received one comment. The comment and the U.S. Institute's response are included in the ICRs. The purpose of this notice is to allow an additional 30 days for public comments regarding these ICRs.

DATES: Comments must be submitted on or before August 29, 2008.

ADDRESSES: Direct comments to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attention:* Heidi King, 725 17th Street, NW., Washington, DC 20503, Desk Officer for The Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, U.S. Institute for Environmental Conflict Resolution, *Heidi_R._King@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the evaluation instruments and supporting documents for the proposed paperwork collections can be downloaded from the Institute's Web site *http://ecr.gov/Resources/EvaluationProgram.aspx.*

For further information or for paper copies of the ICRs, contact: Patricia Orr, Program Manager for Evaluation, U.S. Institute for Environmental Conflict Resolution, 130 South Scott Avenue, Tucson, Arizona 85701, *Fax:* 520–670–5530, *Phone:* 520–901–8548, *E-mail: orr@ecr.gov.*

SUPPLEMENTARY INFORMATION:

Overview

To comply with the Government Performance and Results Act (GPRA) (Pub. L. 103–62), the U.S. Institute for Environmental Conflict Resolution, as part of the Morris K. Udall Foundation, is required to produce, each year, an Annual Performance Budget and an Annual Performance and Accountability Report, linked directly to the goals and objectives outlined in the Institute's five-year Strategic Plan. The U.S. Institute's evaluation system is key to evaluating progress towards achieving its performance commitments. The U.S. Institute is committed to evaluating all of its projects, programs and services not only to measure and report on performance but also to use this information to learn from and improve its services. The refined evaluation system has been carefully designed to support efficient and economical generation, analysis and use of this much-needed information, with an emphasis on performance measurement, learning and improvement.

As part of the program evaluation system, the U.S. Institute intends to collect specific information from participants in, and users of, several of its programs and services. Specifically, seven programs and services are the subject of this Federal Notice: (1) Conflict assessment services; (2) ECR and collaborative problem solving mediation services; (3) ECR and collaborative problem solving facilitation services; (4) training services; (5) facilitated meeting services; (6) roster program services; and (7) program support services. Evaluations will mainly involve administering questionnaires to process participants and professionals, as well as members and users of the National Roster. Responses by members of the public to the Institute's request for information (i.e., questionnaires) will be voluntary.

In 2003, the U.S. Environmental Protection Agency, Conflict Prevention and Resolution Center (CPRC) was granted the approval of the Office of Management and Budget (OMB) to act as a named administrator of the U.S. Institute's currently approved information collections for evaluation. The CPRC and the U.S. Institute seek approval as part of this proposed collection to continue this evaluation partnership. The U.S. Institute will also request similar status for the Department of Interior, Office of Collaborative Action and Dispute Resolution (CADR). Given that other agencies have approached the U.S. Institute seeking (a) evaluation services and (b) assistance in establishing their own internal evaluation systems, the U.S. Institute will also request OMB approval to continue to administer the evaluation questionnaires on behalf of other agencies. The burden estimates in the ICRs take into consideration the multi-agency usage of the evaluation instruments.

Key Issues

The U.S. Institute would appreciate receiving comments that can be used to:

i. Evaluate whether the proposed collection of information is necessary for the proper performance of the U.S. Institute, including whether the information will have practical utility;

ii. Enhance the quality, utility, and clarity of the information to be collected;

iii. Minimize the burden of the information collection on those who are to respond, including suggestions concerning use of automated collection techniques or other forms of information technology (e.g., allowing electronic submission of responses).

Section A. Information on Individual ICRs

1. Conflict Assessment Services

Type of Information Collection: Revision of a currently approved collection.

Title of Information Collection: Program Evaluation Instruments for Conflict Assessment Services.

OMB Number: 3320–0003.

Affected Public: Individuals or households, Business or other for-profit, Not-for-profit, Federal and State, Local or Tribal Government.

Frequency: One time.

Annual Number of Respondents: 455.

Total Annual Responses: 455.

Average Burden per Response: 6 minutes.

Total Annual Hours: 45.50.
Total Burden Cost: $2,047.50.

2. ECR and Collaborative Problem Solving Mediation Services

Type of Information Collection: Revision of a currently approved collection.
Title of Information Collection: Program Evaluation Instruments for ECR and Collaborative Problem Solving Mediation Services.
OMB Number: 3320–0004.
Affected Public: Individuals or households, Business or other for-profit, Not-for-profit, Federal and State, Local or Tribal Government.
Frequency: One time.
Annual Number of Respondents: 2,250.
Total Annual Responses: 2,250.
Average Burden per Response: 20 minutes.
Total Annual Hours: 761.50.
Total Burden Cost: $34,267.50.

3. ECR and Collaborative Problem Solving Facilitation Services

Type of Information Collection: New Collection.
Title of Information Collection: Program Evaluation Instruments for ECR and Collaborative Problem Solving Facilitation Services.
OMB Number: Proposed New Collection.
Affected Public: Individuals or households, Business or other for-profit, Not-for-profit, Federal and State, Local or Tribal Government.
Frequency: One time.
Annual Number of Respondents: 2,250.
Total Annual Responses: 2,250.
Average Burden per Response: 20 minutes.
Total Annual Hours: 761.50.
Total Burden Cost: $34,267.50.

4. Training Services

Type of Information Collection: Revision of a currently approved collection.
Title of Information Collection: Program Evaluation Instruments for Training Services.
OMB Number: 3320–0006.
Affected Public: Individuals or households, Business or other for-profit, Not-for-profit, Federal and State, Local or Tribal Government.
Frequency: One time.
Annual Number of Respondents: 1,950.
Total Annual Responses: 1,950.
Average Burden per Response: 6 minutes.
Total Annual Hours: 195.
Total Burden Cost: $8,775.

5. Facilitated Meeting Services

Type of Information Collection: Revision of a Currently Approved Collection.
Title of Information Collection: Program Evaluation Instruments for Facilitated Meeting Services.
OMB Number: 3320–0007.
Affected Public: Individuals or households, Business or other for-profit, Not-for-profit, Federal and State, Local or Tribal Government.
Frequency: One time.
Annual Number of Respondents: 3,150.
Total Annual Responses: 3,150.
Average Burden per Response: 6 minutes.
Total Annual Hours: 315.
Total Burden Cost: $14,175.

6. Roster Program Services

Type of Information Collection: Revision of a currently approved collection.
Title of Information Collection: Program Evaluation Instruments for Roster Program Services.
OMB Number: 3320–0005.
Affected Public: Business or other for-profit, not-for-profit, Federal and State, Local or Tribal Government.
Frequency: One time.
Annual Number of Respondents: 600.
Total Annual Responses: 600.
Average Burden per Response: 5 minutes.
Total Annual Hours: 50.
Total Burden Cost: $2,250.

7. Program Support Services

Type of Information Collection: Revision of a currently approved collection.
Title of Information Collection: Program Evaluation Instruments for Program Support Services.
OMB Number: 3320–0009.
Affected Public: Business or other for-profit, not-for-profit, Federal and State, Local or Tribal Government.
Frequency: One time.
Annual Number of Respondents: 60.
Total Annual Responses: 60.
Average Burden per Response: 6.
Total Annual Hours: 6.
Total Burden Cost: $270.

Authority: 20 U.S.C. 5601–5609.

Dated: July 24, 2008.

Ellen Wheeler,

Executive Director, Morris K. Udall Foundation.

[FR Doc. E8–17425 Filed 7–29–08; 8:45 am]

BILLING CODE 6820–FN–P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

The United States Institute for Environmental Conflict Resolution; Agency Information Collection Activities; Extension of Currently Approved Information Collection; Comment Request; U.S. Institute for Environmental Conflict Resolution Application for the National Roster of Environmental Dispute Resolution and Consensus Building Professionals

AGENCY: Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, U.S. Institute for Environmental Conflict Resolution.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act and supporting regulations, the U.S. Institute for Environmental Conflict Resolution (the U.S. Institute), part of the Morris K. Udall Foundation, will submit for Office of Management and Budget (OMB) review, a request for an extension for the currently approved information collection request (ICR), OMB Control No. 3320–0008: Application for the National Roster of Environmental Dispute Resolution and Consensus Building Professionals.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (2) the accuracy of the agency's estimate of the time spent completing the application (''burden of the proposed collection of information''), including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information collected; (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before September 29, 2008.

ADDRESSES: Address written comments to Kathleen Docherty, Roster Manager, U.S. Institute for Environmental Conflict Resolution, 130 South Scott Ave., Tucson, Arizona 85701; *Fax:* 520–670–5530; *Phone:* 520–901–8572; *E-mail: docherty@ecr.gov*.

FOR FURTHER INFORMATION CONTACT: Kathleen Docherty by telephone at 520–

901–8572, by fax at 520–670–5530, by e-mail at *docherty@ecr.gov*.

SUPPLEMENTARY INFORMATION: *Abstract:* The U.S. Institute is a federal program established by Congress to assist parties in resolving environmental, natural resource, and public lands conflicts. The U.S. Institute serves as an impartial, non-partisan institution, and accomplishes much of its work by partnering, contracting with, or referral to, experienced practitioners. In addition, the U.S. Institute maintains the National Roster of Environmental Dispute Resolution and Consensus Building Professionals (roster). The Application for the National Roster of Environmental Dispute Resolution and Consensus Building Professionals (application) compiles data available from the resumes of environmental neutrals (mediators, facilitators, etc.) into a format that is standardized for efficient and fair eligibility review, database searches, and retrievals. The roster, the application and the related entry criteria, were developed collaboratively and with the support of the Environmental Protection Agency. A professional needs to complete the application form one time. Once an application is approved, the roster member has access to update information online. The proposed collection is necessary to support ongoing maintenance of the roster and a continuous, open application process. The application and supplementary information are available from the U.S. Institute's Web site. From *http://www.ecr.gov/Resources/Roster/Roster.aspx*, choose righthand navigation bar link to: ''Roster Application: Info and Log In''.

Burden Statement: Burden for potentially affected public: environmental dispute resolution and consensus building professionals (new respondents); existing roster members (for updating).

Proposed Frequency of Response: One initial, with voluntary updates approximately once per year.

Annual Number of Respondents: 30 (new response); 125 (update).

Time per Respondent: 2.5 hours (new response); 15 minutes (update).

Total Annual Hours Burden: 106 (new response and update combined).

Annual Cost Burden: $3,359 (new response); $1,399 (update).

Total Annual Cost Burden: $4,758 (new response and update combined); labor costs exclusively; no capital or start-up costs.

Changes in the Estimates: There are no changes in the labor hours in this ICR compared to the previous ICR. The reduction in cost figures from the previous ICR are due to use of current Bureau of Labor Statistics reports for valuing time (civilian workers category of ''professionals and related occupations'': $44.78 per hour) rather than estimated contractor rates.

Authority: 20 U.S.C. 5601–5609.

Dated the 24th day of July 2008.

Ellen Wheeler,

Executive Director, Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, and Federal Register Liaison Officer.

[FR Doc. E8–17426 Filed 7–29–08; 8:45 am]

BILLING CODE 6820–FN–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received under the Antarctic Conservation Act of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at title 45 part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by August 29, 2008. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy at the above address or (703) 292–7405.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas as requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. Applicant

Permit Application No. 2009–012, Judit Hersko, Visual and Performing Arts Department, California State University—San Marcos, San Marcos, CA 92096–0001.

Activity for Which Permit Is Requested

Enter Antarctic Specially Protected Areas. The applicant plans to enter ASPA 121—Cape Royds, ASPA 131—Canada Glacier and Lake Fryxell, ASPA 158—Hut Point Discovery Hut, ASPA 157—Backdoor Bay, Cape Royds, and ASPA 155—Cape Evans. The applicant plans to photograph and document the historic huts and observe and interview scientists working in the Specially Protected Areas.

Location

ASPA 121—Cape Royds, ASPA 131—Canada Glacier and Lake Fryxell, ASPA 158—Hut Point Discovery Hut, ASPA 157—Backdoor Bay, Cape Royds, and ASPA 155—Cape Evans.

Dates

December 1, 2008 to February 1, 2009.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. E8–17420 Filed 7–29–08; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–335–CO, 50–389–CO]; ASLBP No. 08–866–01–CO–BD01]

Florida Power And Light Co.; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board is being established to preside over the following proceeding:

Florida Power and Light Co., St. Lucie Nuclear Plant, Units 1 and 2

(Confirmatory Order, Effective Immediately)

This Board is being established in response to a request for hearing that was filed pursuant to a notice issued by the NRC Staff (73 FR 36,131 (June 25, 2008)) that provided an opportunity for a hearing on the immediately effective confirmatory order of June 13, 2008 for the St. Lucie Nuclear Plant. The confirmatory order arose from investigations at St. Lucie Nuclear Plant by the NRC Staff that identified apparent violations for which escalated enforcement action was considered. The confirmatory order is the result of an agreement reached between the NRC Staff and the licensee, Florida Power and Light Co., during an alternative dispute resolution session. The NRC Staff determined that its concerns regarding public health and safety could be resolved through confirmation of the licensee's commitments as prescribed in the confirmatory order. Mr. Thomas Saporito, in his capacity as president of Saporito Energy Consultants (SEC), has submitted a request for hearing on behalf of SEC and himself.

The Board is comprised of the following administrative judges:

William J. Froehlich, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Thomas S. Moore, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Michael F. Kennedy, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007 (72 FR 49,139).

Issued at Rockville, Maryland, this 24th day of July, 2008.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. E8–17437 Filed 7–29–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–06; EA–08–202]

In the Matter of: Carolina Power and Light Company, Brunswick Steam Electric Plant; Independent Spent Fuel Storage Installation Order Modifying License (Effective Immediately)

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Issuance of Order for Implementation of Additional Security Measures and Fingerprinting for Unescorted Access to Brunswick Steam Electric Plant Independent Spent Fuel Storage Installation.

FOR FURTHER INFORMATION, CONTACT: Kevin M. Witt, Project Manager, Rules, Inspections and Operations Branch, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards (NMSS), U.S. Nuclear Regulatory Commission (NRC), Rockville, MD 20852. Telephone: (301) 492–3323; fax number: (301) 492–3348; e-mail: *Kevin.Witt@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to 10 CFR 2.106, NRC (or the Commission) is providing notice, in the matter of Brunswick Steam Electric Plant Independent Spent Fuel Storage Installation (ISFSI) Order Modifying License (Effective Immediately).

II. Further Information

NRC has issued a general license, to Carolina Power and Light Company (CP&L), authorizing the operation of an ISFSI, in accordance with the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 CFR) part 72. This Order is being issued to CP&L, which has identified near-term plans to store spent fuel in an ISFSI under the general license provisions of 10 CFR part 72. The Commission(s regulations at 10 CFR 72.212(b)(5) and 10 CFR 73.55(h)(1) require CP&L to maintain safeguards contingency plan procedures to respond to threats of radiological sabotage and to protect the spent fuel against the threat of radiological sabotage, in accordance with 10 CFR part 73, Appendix C. Specific safeguards requirements are contained in 10 CFR 73.51 or 73.55, as applicable.

Inasmuch as an insider has an opportunity equal to, or greater than, any other person, to commit radiological sabotage, the Commission has determined that these measures are prudent. Comparable orders have been issued to all licensees that currently store spent fuel, or have identified near-term plans to store spent fuel, in an ISFSI.

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY, and Washington, DC, using large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees, to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. On October 16, 2002, the Commission issued Orders to the licensees of operating ISFSIs, to place the actions taken in response to the Advisories into the established regulatory framework, and to implement additional security enhancements that emerged from NRC's ongoing comprehensive review. The Commission has also communicated with other Federal, State, and local government agencies and industry representatives to discuss and evaluate the current threat environment, to assess the adequacy of security measures at licensed facilities. In addition, the Commission has conducted a comprehensive review of its safeguards and security programs and requirements.

As a result of its consideration of current safeguards and security requirements, as well as a review of information provided by the intelligence community, the Commission has determined that certain additional security measures (ASMs) are required to address the current threat environment, in a consistent manner, throughout the nuclear ISFSI community. Therefore, the Commission is imposing requirements, as set forth in Attachments 1 and 2 of this Order, on all licensees of these facilities. These requirements, which supplement existing regulatory requirements, will provide the Commission with reasonable assurance that the public health and safety and common defense and security continue to be adequately protected in the current threat environment. These requirements will remain in effect until the Commission determines otherwise.

The Commission recognizes that CP&L may have already initiated many of the measures set forth in Attachments 1 and 2 to this Order, in response to previously issued advisories, or on its own. It also recognizes that some measures may not be possible nor necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at CP&L's facility, to achieve the intended objectives and avoid any unforeseen effect on the safe storage of spent fuel.

Although the ASMs already implemented by licensees in response to the Safeguards and Threat Advisories have been sufficient to provide reasonable assurance of adequate protection of public health and safety, the Commission concludes that these actions must be supplemented further because the current threat environment continues to persist. Therefore, it is appropriate to require certain ASMs, and these measures must be embodied in an Order, consistent with the established regulatory framework.

To provide assurance that CP&L is implementing prudent measures to achieve a consistent level of protection to address the current threat environment, CP&L's general license issued pursuant to 10 CFR 72.210 shall be modified to include the requirements identified in Attachments 1 and 2 to this Order. In addition, pursuant to 10 CFR 2.202, I find that, in light of the common defense and security circumstances described above, the public health, safety, and interest require that this Order be effective immediately.

Accordingly, pursuant to Sections 53, 103, 104, 147, 149, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR parts 50, 72, and 73, *it is hereby ordered,* effective immediately, that your general license is modified as follows:

A. CP&L shall comply with the requirements described in Attachments 1 and 2 to this Order, except to the extent that a more stringent requirement is set forth in CP&L's security plan. CP&L shall immediately start implementation of the requirements in Attachments 1 and 2 to the Order and shall complete implementation no later than 180 days from the date of this Order, with the exception of the ASM B.4 of Attachment 1 [Additional Security Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs)''], which shall be implemented no later than 365 days from the date of this Order. In any event, CP&L shall complete implementation of all ASMs no later than 30 days before the first day that spent fuel is scheduled to be initially placed in the ISFSI.

B.1. CP&L shall, within twenty (20) days of the date of this Order, notify the Commission: (1) If it is unable to comply with any of the requirements described in Attachments 1 and 2; (2) if compliance with any of the requirements is unnecessary, in its specific circumstances; or (3) if implementation of any of the requirements would cause CP&L to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide CP&L's justification for seeking relief from, or variation of, any specific requirement.

2. If CP&L considers that implementation of any of the requirements described in Attachments 1 and 2 to this Order would adversely impact the safe storage of spent fuel, CP&L must notify the Commission, within twenty (20) days of the date of this Order, of the adverse safety impact, the basis for its determination that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives specified in the Attachment 1 and/or 2 requirements in question, or a schedule for modifying the facility, to address the adverse safety condition. If neither approach is appropriate, CP&L must supplement its response, to Condition B.1 of this Order, to identify the condition as a requirement with which it cannot comply, with attendant justifications, as required under Condition B.1.

C.1. CP&L shall, within twenty (20) days of the date of this Order, submit, to the Commission, a schedule for achieving compliance with each requirement described in Attachments 1 and 2.

2. CP&L shall report to the Commission when it has achieved full compliance with the requirements described in Attachments 1 and 2.

D. All measures implemented or actions taken in response to this Order shall be maintained until the Commission determines otherwise.

CP&L's response to Conditions B.1, B.2, C.1, and C.2, above, shall be submitted in accordance with 10 CFR 72.4. In addition, submittals that contain Safeguards Information shall be properly marked and handled, in accordance with 10 CFR 73.21.

The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, relax or rescind any of the above conditions, for good cause.

In accordance with 10 CFR 2.202, CP&L must, and any other person adversely affected by this Order may, submit an answer to this Order within 20 days of the date of the Order. In addition, CP&L, and any other person adversely affected by this Order, may request a hearing on this Order, within 20 days of the date of the Order. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be made, in writing, to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which CP&L relies, and the reasons why the Order should not have been issued. If a person other than CP&L requests a hearing, that person shall set forth, with particularity, the manner in which his interest is adversely affected by this Order, and shall address the criteria set forth in 10 CFR 2.309(d).

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding before the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which NRC promulgated in August 2007, 72 FR 49139 (August 28, 2007) and codified in pertinent part at 10 CFR part 2, subpart B. The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases, to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements associated with E-Filing, at least five (5) days before the filing deadline, the requestor must contact the Office of the Secretary, by e-mail, at *Hearing.Docket@nrc.gov*, or by calling (301) 415–1677, to request: (1) A digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any NRC proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding [even in instances when the requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate]. Each requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is also available on NRC's public Web site, at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, he/she can then submit a request for a hearing through EIE. Submissions should be in Portable Document Format, in accordance with NRC guidance, available on the NRC public Web site, at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the filer submits its document through EIE. To be timely, electronic filings must be submitted to the EIE system no later than 11:59 p.m. Eastern Time, on the due date. On receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, any others who wish to participate in the proceeding (or their counsel or representative) must apply for, and receive, digital ID certificates, before hearing requests are filed, so that they may obtain access to the documents via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact-Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or, locally, (301) 415–4737.

Participants who believe that they have good cause for not submitting documents electronically must file motions, in accordance with 10 CFR 2.302(g), with their initial paper filings, requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail, addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete, by first-class mail, as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service on depositing the document with the provider of the service.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket, which is available to the public at *http://ehd.nrc.gov/EHD Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers, in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair-Use application, Participants are requested not to include copyrighted materials in their works.

If a hearing is requested by CP&L or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), CP&L may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the grounds that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions, as specified in section III, shall be final twenty (20) days from the date of this Order, without further Order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions, as specified in section III, shall be final when the extension expires, if a hearing request has not been received. An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated at Rockville, Maryland this 21st day of July 2008.

For the Nuclear Regulatory Commission.

Michael F. Weber,

Director, Office of Nuclear Material Safety and Safeguards.

Attachment 1—Additional Security Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs) contains Safeguards Information and is not included in the **Federal Register** Notice

Attachment 2—Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations, Dated December 19, 2007

A. General Basis Criteria

1. These additional security measures (ASMs) are established to delineate an independent spent fuel storage installation (ISFSI) licensee's responsibility to enhance security measures related to authorization for unescorted access to the protected area of an ISFSI in response to the current threat environment.

2. Licensees whose ISFSI is collocated with a power reactor may choose to comply with the NRC-approved reactor access authorization program for the associated reactor as an alternative means to satisfy the provisions of sections B through G below. Otherwise, licensees shall comply with the access authorization and fingerprinting requirements of section B through G of these ASMs.

3. Licensees shall clearly distinguish in their 20-day response which method they intend to use in order to comply with these ASMs.

B. Additional Security Measures for Access Authorization Program

1. The licensee shall develop, implement and maintain a program, or enhance their existing program, designed to ensure that persons granted unescorted access to the protected area of an ISFSI are trustworthy and reliable and do not constitute an unreasonable risk to the public health and safety or the common defense and security, including a potential to commit radiological sabotage.

a. To establish trustworthiness and reliability, the licensee shall develop, implement, and maintain procedures for conducting and completing background investigations, prior to granting access. The scope of background investigations must address at least the past 3 years and, as a minimum, must include:

i. Fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check (CHRC). Where an applicant for unescorted access has been previously fingerprinted with a favorably completed CHRC (such as a CHRC pursuant to compliance with orders for access to safeguards information), the licensee may accept the results of that CHRC, and need not submit another set of fingerprints, provided the CHRC was completed not more than 3 years from the date of the application for unescorted access.

ii. Verification of employment with each previous employer for the most recent year from the date of application.

iii. Verification of employment with an employer of the longest duration during any calendar month for the remaining next most recent two years.

iv. A full credit history review.

v. An interview with not less than two character references, developed by the investigator.

vi. A review of official identification (e.g., driver's license, passport, government identification, state, province or country of birth issued certificate of birth) to allow comparison of personal information data provided by the applicant. The licensee shall maintain a photocopy of the identifying document(s) on file, in accordance with ''Protection of Information,'' in Section G of these ASMs.

vii. Licensees shall confirm eligibility for employment through the regulations of the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), and shall verify and ensure to the extent possible, the accuracy of the provided social security number and alien registration number as applicable.

b. The procedures developed or enhanced shall include measures for confirming the term, duration, and character of military service for the past 3 years, and/or academic enrollment and attendance in lieu of employment for the past 5 years.

c. Licensees need not conduct an independent investigation for individuals employed at a facility who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

d. A review of the applicant's criminal history, obtained from local criminal justice resources, may be included in addition to the FBI CHRC, and is encouraged if the results of the FBI CHRC, employment check, or credit check disclose derogatory information. The scope of the applicant's local criminal history check shall cover all residences of record for the past 3 years from the date of the application for unescorted access.

2. The licensee shall use any information obtained as part of a CHRC solely for the purpose of determining an individual's suitability for unescorted access to the protected area of an ISFSI.

3. The licensee shall document the basis for its determination for granting or denying access to the protected area of an ISFSI.

4. The licensee shall develop, implement, and maintain procedures for updating background investigations for persons who are applying for reinstatement of unescorted access. Licensees need not conduct an independent reinvestigation for individuals who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

5. The licensee shall develop, implement, and maintain procedures for reinvestigations of persons granted unescorted access, at intervals not to exceed 5 years. Licensees need not conduct an independent reinvestigation for individuals employed at a facility who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

6. The licensee shall develop, implement, and maintain procedures designed to ensure that persons who have been denied unescorted access authorization to the facility are not allowed access to the facility, even under escort.

7. The licensee shall develop, implement, and maintain an audit program for licensee and contractor/vendor access authorization programs that evaluate all program elements and include a person knowledgeable and practiced in access authorization program performance objectives to assist in the overall assessment of the site's program effectiveness.

C. Fingerprinting Program Requirements

1. In a letter to the NRC, the licensee must nominate an individual who will review the results of the FBI CHRCs to make trustworthiness and reliability determinations for unescorted access to an ISFSI. This individual, referred to as the ''reviewing official,'' must be someone who requires unescorted access to the ISFSI. The NRC will review the CHRC of any individual nominated to perform the reviewing official function. Based on the results of the CHRC, the NRC staff will determine whether this individual may have access. If the NRC determines that the nominee may not be granted such access, that individual will be prohibited from obtaining access.[1] Once the NRC approves a reviewing official, the reviewing official is the only individual permitted to make access determinations for other individuals who have been identified by the licensee as having the need for unescorted access to the ISFSI, and have been fingerprinted and have had a CHRC in accordance with these ASMs. The reviewing official can only make access determinations for other individuals, and therefore cannot approve other individuals to act as reviewing officials. Only the NRC can approve a reviewing official. Therefore, if the licensee wishes to have a new or additional reviewing official, the NRC must approve that individual before he or she can act in the capacity of a reviewing official.

[1] The NRC's determination of this individual's unescorted access to the ISFSI, in accordance with the process is an administrative determination that is outside the scope of the Order.

2. No person may have access to SGI or unescorted access to any facility subject to NRC regulation if the NRC has determined, in accordance with its administrative review process based on fingerprinting and an FBI identification and CHRC, that the person may not have access to SGI or unescorted access to any facility subject to NRC regulation.

3. All fingerprints obtained by the licensee pursuant to this Order must be submitted to the Commission for transmission to the FBI.

4. The licensee shall notify each affected individual that the fingerprints will be used to conduct a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the ''Right to Correct and Complete Information'' in section F of these ASMs.

5. Fingerprints need not be taken if the employed individual (e.g., a licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.61, has a favorably adjudicated U.S. Government CHRC within the last five (5) years, or has an active federal security clearance. Written confirmation from the Agency/employer who granted the federal security clearance or reviewed the CHRC must be provided to the licensee. The licensee must retain this documentation for a period of three (3) years from the date the individual no longer requires access to the facility.

D. Prohibitions

1. A licensee shall not base a final determination to deny an individual unescorted access to the protected area of an ISFSI solely on the basis of information received from the FBI involving: an arrest more than one (1) year old for which there is no information of the disposition of the case, or an arrest that resulted in dismissal of the charge or an acquittal.

2. A licensee shall not use information received from a CHRC obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the licensee use the information in any way which would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

E. Procedures for Processing Fingerprint Checks

1. For the purpose of complying with this Order, licensees shall, using an appropriate method listed in 10 CFR 73.4, submit to the NRC's Division of

Facilities and Security, Mail Stop T–6E46, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking unescorted access to an ISFSI, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling (301) 415–5877, or by e-mail to *forms@nrc.gov.* Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

2. The NRC will review submitted fingerprint cards for completeness. Any Form FD–258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free re-submission must have the FBI Transaction Control Number reflected on the re-submission. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

3. Fees for processing fingerprint checks are due upon application. The licensee shall submit payment of the processing fees electronically. In order to be able to submit secure electronic payments, licensees will need to establish an account with Pay.Gov (*https://www.pay.gov*). To request an account, the licensee shall send an e-mail to *det@nrc.gov.* The email must include the licensee's company name, address, point of contact (POC), POC email address, and phone number. The NRC will forward the request to Pay.Gov; who will contact the licensee with a password and user lD. Once licensees have established an account and submitted payment to Pay.Gov, they shall obtain a receipt. The licensee shall submit the receipt from Pay.Gov to the NRC along with fingerprint cards. For additional guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 415–7739. Combined payment for multiple applications is acceptable. The application fee (currently $36) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will directly notify licensees who are subject to this regulation of any fee changes.

4. The Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks, including the FBI fingerprint record.

F. Right To Correct and Complete Information

1. Prior to any final adverse determination, the licensee shall make available to the individual the contents of any criminal history records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of notification.

2. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of a FBI CHRC after the record is made available for his/her review. The licensee may make a final access determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to an ISFSI, the licensee shall provide the individual its documented basis for denial. Access to an ISFSI shall not be granted to an individual during the review process.

G. Protection of Information

1. The licensee shall develop, implement, and maintain a system for personnel information management with appropriate procedures for the protection of personal, confidential information. This system shall be designed to prohibit unauthorized access to sensitive information and to prohibit modification of the information without authorization.

2. Each licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures, for protecting the record and the personal information from unauthorized disclosure.

3. The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining suitability for unescorted access to the protected area of an ISFSI. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have the appropriate need-to-know.

4. The personal information obtained on an individual from a criminal history record check may be transferred to another licensee if the gaining licensee receives the individual's written request to re-disseminate the information contained in his/her file, and the gaining licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

5. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

[FR Doc. E8–17438 Filed 7–29–08; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Submission of Information Collection for OMB Review; Comment Request; Locating and Paying Participants

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval, with modifications.

SUMMARY: Pension Benefit Guaranty Corporation (PBGC) is requesting that the Office of Management and Budget (OMB) extend its approval, with modifications, of a collection of information under the Paperwork Reduction Act (OMB control number 1212–0055, expires August 31, 2008). The purpose of the information collection is to enable PBGC to locate and pay benefits to participants and beneficiaries in plans covered by the PBGC insurance program, as well as other pension plans that will be covered by PBGC's expanded Missing Participant program under the Pension Protection Act of 2006. This notice informs the public of PBGC's request and solicits public comment on the collection of information.

DATES: Comments should be submitted by August 29, 2008.

ADDRESSES: Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974.

Copies of the collection of information may also be obtained without charge by writing to the Disclosure Division of the Office of the General Counsel of PBGC at the above address or by visiting the Disclosure Division or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.) The Disclosure Division will e-mail, fax, or mail the requested information to you, as you request.

FOR FURTHER INFORMATION CONTACT: Jo Amato Burns, Attorney, or Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024. (For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC is requesting that OMB extend its approval, with modifications, of a collection of information needed to pay participants and beneficiaries who may be entitled to pension benefits under a defined benefit plan that has terminated. The collection consists of information participants and beneficiaries are asked to provide in connection with applications for benefits. In addition, in some instances, as part of a search for participants and beneficiaries who may be entitled to benefits, PBGC requests individuals to provide identifying information that the individual would provide as part of an initial contact with PBGC. The information collection also includes My Pension Benefit Account (My PBA), an application on PBGC's Web site, *http://www.pbgc.gov*, through which plan participants and beneficiaries may conduct electronic transactions with PBGC, including applying for pension benefits, designating a beneficiary, granting a power of attorney, changing contact information, and applying for electronic direct deposit. All requested information is needed to enable PBGC to determine benefit entitlements and to make appropriate payments, or to provide respondents with specific information about their pension plan to enable them to obtain a rough estimate of their benefit.

This collection of information has been approved by OMB under control number 1212–0055 (expires August 31, 2008). PBGC is requesting that OMB extend its approval for three years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

For plans covered by the PBGC insurance program, PBGC estimates that 84,800 benefit application or information forms will be filed annually by individuals entitled to benefits from PBGC and that the associated burden is 63,550 hours and $3,100. PBGC further estimates that 12,000 individuals annually will provide PBGC with identifying information as part of an initial contact and that the associated burden is 3,500 hours. Thus, for plans covered by the PBGC insurance program, the total estimated annual burden associated with this collection of information is 67,050 hours and $3,100.

Section 410 of the Pension Protection Act of 2006 allows certain terminating plans not covered by the existing Missing Participants program to participate in that program. Once final regulations are issued, the program will cover multiemployer plans, small professional service employer plans (25 or fewer active participants), and individual account plans. PBGC anticipates issuing final regulations in 2009.

PBGC estimates that 6,400 benefit application or information forms will be filed annually by missing participants in plans that are not covered by the existing Missing Participant program, and that the associated burden is 6,400 hours. PBGC further estimates that 12,000 individuals annually will provide the PBGC with identifying information as part of an initial contact and that the associated burden is 3,000 hours.

Thus, over the next three years, the total estimated annual burden associated with this collection of information is 73,300 hours and $3,100.

Issued in Washington, DC, this 25th day of July, 2008.

Catherine B. Klion,

Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation.

[FR Doc. E8–17470 Filed 7–29–08; 8:45 am]

BILLING CODE 7709–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58221; File No. SR–BSE–2008–29]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating To Doing Business With the Public

July 24, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 14, 2008, the Boston Stock Exchange, Inc. (the ''Exchange'' or ''BSE''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend certain rules that govern an Exchange member's conduct of doing business with the public. Specifically, the proposed rule change would require participants to integrate the responsibility for supervision of their public customer options business into their overall supervisory and compliance programs. In addition, the proposal would require members to strengthen their supervisory procedures

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and internal controls as related to their public customer options business. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and at *http://www.bostonstock.com/BostonstockPDF/Legal/filings/2008-29.pdf.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

a. Integration of Options Supervision

The purpose of the proposed rule change is to create a supervisory structure for options that is similar to that required by New York Stock Exchange, LLC (''NYSE'') Rule 342 and National Association of Securities Dealers, Inc. (''NASD'') (n/k/a Financial Industry Regulatory, Inc. (''FINRA'')) Rule 3010. The proposed rule change would also conform Boston Options Exchange Group, LLC (''BOX'') rules to those of the Chicago Board Options Exchange, Incorporated (''CBOE''), which has recently eliminated the requirement that participants qualified to do a public customer business in options designate a single person to act as a Senior Registered Options Principal (''SROP'') for the participant and that each such participant designate a specific individual as a Compliance Registered Options Principal (''CROP'').[3] Instead, the rule requires participants to integrate the SROP and CROP functions into their overall supervisory and compliance programs.

The SROP concept was first introduced during the early years of development of the listed options market. Previously, participants were required to designate one or more persons qualified as Registered Options Principals (''ROPs'') to have supervisory responsibilities with respect to the firms' options business. As the number of ROPs at larger firms began to increase, an additional requirement was imposed that firms designate one of their ROPs as the SROP. This was intended to eliminate confusion as to where the compliance and supervisory responsibilities lay by centralizing in a single supervisory officer overall responsibility for the supervision of a firm's options activities.[4] Subsequently, following the recommendation of the Special Study, the options exchanges required firms to designate a CROP to be responsible for each firm's overall compliance program with respect to its options activities.[5] The CROP could be the same person designated as a SROP, but while the CROP generally was not permitted to have sales functions in the firm, the SROP was not so restricted.

Since the SROP and CROP requirements were first imposed, the supervisory function with respect to options activities of most securities firms has been integrated into the matrix of supervisory and compliance functions in respect of the firms' other securities activities. This not only reflects the maturity of the options market, but also recognizes the ways in which the uses of options themselves have become more integrated with other securities in the implementation of particular strategies. To further reflect the trend toward integration, and to conform BOX rules to the recently amended FINRA rules, the proposed change designates all options principals as Registered Options and Security Futures Principals (''ROSFPs'').[6] By permitting supervision of a firm's options activities to be handled in the same manner as the supervision of its securities and futures activities, the proposed rule change would ensure that supervisory responsibility over each segment of a firm's business is assigned to the best qualified persons in the firm, thereby enhancing the overall quality of supervision and compliance.

The proposed rule change would allow firms the flexibility to assign such supervisory and compliance responsibilities, which formerly resided with the SROP and/or CROP, to more than one individual. For example, the proposed rule change would permit a participant firm to designate certain ROSFPs to be responsible for a variety of supervisory compliance functions such as approving acceptance of discretionary accounts[7] and exceptions to a participant firm's suitability standards for trading uncovered short options.[8] A firm would be likely to do this in instances where it believes it advantageous to do so to enhance its supervisory or compliance structure. Typically, a firm may also wish to divide these functions on the basis of geographic region or functional considerations. BOX Rule, Chapter XI, Sec. 2 would be amended to clarify the qualification requirements of individuals designated as ROSFPs.[9] BOX Rule, Chapter XI, Sec. 3 would be amended to specify the registration requirements of individuals who accept orders from non-broker-dealer customers.[10]

The proposed rule change would require options discretionary accounts to be accepted by individuals who are qualified ROSFPs. The proposed rule change would eliminate the requirement that discretionary options orders be approved on the day of entry by a ROSFP (with one exception as discussed below). This requirement predates the Special Study and is not consistent with the use of supervisory tools in computerized format or exception reports after the close of a trading day. No similar requirement exists for supervision of other securities accounts that are handled on a discretionary basis.[11] Discretionary orders must be reviewed in accordance with a participant's written supervisory procedures. The proposed rule change would ensure that supervisory responsibilities are assigned to specific ROSFP-qualified individuals, thereby enhancing the quality of supervision.

BOX Rule, Chapter XI, Sec. 12 would be revised by adding the requirement that any participant that does not utilize computerized surveillance tools for the frequent and appropriate review of discretionary account activity must establish and implement procedures to require ROSFP-qualified individuals who have been designated to review discretionary accounts to approve and

[3] *See* Securities Exchange Act Release No. 56492 (September 21, 2007) 72 FR 54952 (September 27, 2007) (SR–CBOE–2007–106) (approval order).

[4] Securities and Exchange Commission, 96th Cong., 1st Sess., Report of the Special Study of the Options Markets (Comm. Print 1978) (''Special Study'') p. 316 fn. 11.

[5] *Id.* at 335.

[6] *See* Securities Exchange Act Release No. 57775 (May 5, 2008) 73 FR 26453 (May 9, 2008) (SR–FINRA–2007–035) (approval order). *See also* Securities Exchange Act Release No. 56663 (October 15, 2002) 67 FR 64944 (October 22, 2002) (approval order) (modifying and broadening NASD registration categories to include security futures activities by, among other things, amending the title of the Series 4 registration to Registered Options and Security Futures Principal).

[7] *See* proposed BOX Rule Chapter XI, Sec. 12.

[8] *See* proposed BOX Rule Chapter XI, Sec. 9(f)(iii).

[9] *See* proposed BOX Rule Chapter XI, Sec.2(d) and (e).

[10] *See* proposed BOX Rule Chapter XI, Sec. 3(d).

[11] *See, e.g.*, NYSE Rule 408.

initial each discretionary order on the day entered. The Exchange believes that any firm that does not utilize computerized surveillance tools to monitor discretionary account activity should continue to be required to perform the daily manual review of discretionary orders.

Under the proposed rule change, firms would continue to be required to designate ROSFP-qualified individuals to provide frequent appropriate supervisory review of options discretionary accounts. This includes a review of the accounts in order to determine whether the ROSFP accepting the account had a reasonable basis for believing that the customer was able to understand and bear the risks of the proposed strategies or transactions. This requirement would provide an additional level of supervisory audit over options discretionary accounts that do not exist for other securities discretionary accounts.

In addition, the proposed rule change would require that each participant submit to the Exchange a written report by April 1 of each year that details the participant's supervision and compliance effort, including its options compliance program, during the preceding year and reports on the adequacy of the participant's ongoing compliance processes and procedures.[12]

Proposed BOX Rule Chapter XI, Sec. 10(h) would require that each participant submit, by April 1 of each year, a copy of the BOX Rule Chapter XI, Sec. 10(g) annual report to one or more of its control persons or, if the participant has no control person, to the audit committee of its board of directors or its equivalent committee or group.[13] Further, the proposed rule would provide that a participant that specifically includes its options compliance program in a report that complies with substantially similar NYSE and NASD rules would be deemed to have satisfied the requirements of BOX Rules, Chapter XI, Sec. 10(g) and (h).

Participants would be required to designate a single general partner or executive officer to assume overall authority and responsibility for internal supervision, control of the organization and compliance with securities laws and regulations.[14] Participants would also be required to designate specific qualified individuals as having supervisory or compliance responsibilities over each aspect of the firm's options activities and to set forth the names and titles of these individuals in their written supervisory procedures.[15]

The Exchange believes the proposed rule changes would increase accountability and eliminate impractical and unrealistic supervisory standards applicable solely to listed options. The Exchange believes that the proposed rule changes are appropriate and would not materially alter the supervisory operations of firms.

b. Supervisory Procedures and Internal Controls

The Exchange is also proposing to amend certain rules to strengthen participants' supervisory procedures and internal controls relating to a participant's public customer options business. The proposed rule changes discussed below are modeled after NYSE and NASD rules approved by the Commission in 2004.[16] This proposal is appropriate and consistent with the proposal discussed above to integrate the responsibility for supervision of a participant firm's public customer options business into its overall supervisory and compliance program.

The Exchange is proposing to revise BOX Rule, Chapter XI, Sec. 10(a) to require the development and implementation of written policies and procedures reasonably designed to supervise sales managers and other supervisory personnel who service customer options accounts.[17] This requirement would apply to branch office managers, sales managers, regional/district sales managers, or any person performing a similar supervisory function. Such policies and procedures are expected to encompass all options sales-related activities. Proposed BOX Rule, Chapter XI, Sec. 10(a)(3)(i) would require that supervisory reviews of producing sales managers be conducted by a qualified ROSFP who is either senior to, or otherwise ''independent of,'' the producing manager under review. This provision is intended to ensure that all options sales activity of a producing manager is monitored by persons who do not have a personal interest in such activity.

Proposed BOX Rule, Chapter XI, Sec. 10(a)(3)(ii) would provide an exception for participants so limited in size and resources that there is no qualified person senior to, or otherwise independent of, the producing manager to conduct the review. In this case, the review would be conducted by a qualified ROSFP to the extent practicable. Under proposed BOX Rule, Chapter XI, Sec. 10(a)(3)(iii), a participant relying on the limited size and resources exception must document the factors used to determine that compliance with each of the ''senior'' or ''otherwise independent'' standards of proposed BOX Rule, Chapter XI, Sec. 10(a)(3)(i) is not possible, and that the required supervisory systems and procedures in place, with respect to any producing manager, comply with the provisions of proposed BOX Rule, Chapter XI, Sec. 10(a)(3)(i) to the extent practical.[18]

Proposed BOX Rule, Chapter XI, Sec. 10(c)(1) would require participants to develop and maintain adequate controls over each of their business activities. The proposed rule would further require that such controls include the establishment of procedures to independently verify and test the supervisory systems and procedures for those business activities. A participant would be required to include in the annual report, prepared pursuant to proposed BOX Rule, Chapter XI, Sec. 10(g), a review of the participant's efforts in this regard, including a summary of the tests conducted and significant exceptions identified. The Exchange believes proposed BOX Rule, Chapter XI, Sec. 10(c)(1) would enhance the overall quality of each participant's supervision and compliance function.[19]

Proposed BOX Rule, Chapter XI, Sec. 10(d) would establish requirements for branch office inspections similar to the requirements of NYSE Rule 342.24. Specifically BOX Rule, Chapter XI, Sec. 10(d) would require a participant to inspect, at least annually, each supervisory branch office and inspect each non-supervisory branch office at least once every three years.[20] The

[12] *See* proposed BOX Rule, Chapter XI, Sec. 10(g), which is modeled after NYSE Rule 342.30.

[13] *See* proposed BOX Rule, Chapter XI, Sec. 10(h), which is modeled after NYSE Rule 354.

[14] *See* proposed BOX Rule, Chapter XI, Sec. 10(a).

[15] *See* proposed BOX Rule, Chapter XI, Sec. 10(i).

[16] *See* Securities Exchange Act Release Nos. 49882 (June 17, 2004), 69 FR 35108 (June 23, 2004) (SR–NYSE–2002–36 (approval order), 49883 (June 17, 2004), 69 FR (June 23, 2004) (SR–NASD–2002–162) (approval order).

[17] Proposed BOX Rule, Chapter XI, Sec. 10(a) is modeled after NYSE Rule 342.19.

[18] Proposed BOX Rule, Chapter XI, Sec. 10(a)(3)(iv) would provide that a participant that complies with the NYSE or NASD rules that are substantially similar to the requirements in BOX Rules, Chapter XI, Secs. 10(a)(3)(1) and (a)(3)(2) and (a)(3)(3) will be deemed to have met such requirements.

[19] Proposed BOX Rule, Chapter XI, Sec. 10(c)(1) is modeled after NYSE Rule 342.23. Paragraph (c)(2) of proposed BOX Rule, Chapter XI, Sec. 10(c)(1) would provide that a participant that complies with NYSE or NASD rules that are substantially similar to the requirements in paragraph (c)(1) of proposed BOX Rule, Chapter XI, Sec 10 will be deemed to have met such requirements.

[20] Proposed BOX Rules, Chapter XI, Secs. 10(d)(1)(i) and (ii) would provide members with two exceptions from the annual supervisory branch office inspection requirements.

proposed rule would further require persons who conduct a participant's annual branch office inspection to be independent of the direct supervision or control of the branch office (*i.e.*, not the branch office manager, or any person who directly or indirectly reports to such manager, or any person to whom such manager directly reports). The Exchange believes that requiring branch office inspections to be conducted by someone who has no significant financial interest in the success of a branch office should lead to more objective and vigorous inspections.

Under proposed BOX Rule, Chapter XI, Sec. 10(e), any firm seeking an exemption, pursuant to BOX Rule, Chapter XI, Sec. 10(d)(1)(ii), from the annual branch office inspection requirement would be required to submit to the Exchange written policies and procedures for systematic risk-based surveillance of its branch offices, as defined in BOX Rule, Chapter XI, Sec. 10(e). Proposed BOX Rule, Chapter XI, Sec. 10(f) would require the annual branch office inspection program to include, at a minimum, testing and verification of specified internal controls.[21] Proposed BOX Rule, Chapter XI, Sec. 10(d)(3) would provide that a participant that complies with the requirements of NASD or the NYSE that are substantially similar to the requirements of BOX Rule, Chapter XI, Sec. 10(d)(e) and (f) would be deemed to have met such requirements. The Exchange is also proposing to amend BOX Rule, Chapter XI, Sec. 10 to define ''branch office'' in a way that is substantially similar to the definition of branch office in NYSE Rule 342.10.

Proposed BOX Rule, Chapter XI, Sec. 10(g)(4) would require a firm to designate a Chief Compliance Officer (CCO). Proposed BOX Rule, Chapter XI, Sec. 10(g)(5) would require each firm's Chief Executive Officer (CEO), or equivalent, to certify annually that the participant organization has in place processes to: (1) Establish and maintain policies and procedures reasonably designed to achieve compliance with applicable Exchange rules and federal securities laws and regulations, (2) modify such policies and procedures as business, regulatory, and legislative changes and events dictate, and (3) test the effectiveness of such policies and procedures on a regular basis, the timing of which is reasonably designed to ensure continuing compliance with Exchange rules and federal securities laws and regulations.[22]

Proposed BOX Rule, Chapter XI, Sec. 10(g)(5) would also require the CEO to attest (1) That the CEO has conducted one or more meetings with the CCO in the preceding 12 months to discuss the compliance processes in proposed BOX Rule, Chapter XI, Sec. 10(g)(5)(i), (2) that he or she has consulted with the CCO and other officers to the extent necessary to attest to the statements in the certification, and (3) that the compliance processes are evidenced in a report, reviewed by the CEO, CCO and such other officers as the participant firm deems necessary to make the certification, that is provided to the participant firm's board of directors and audit committee (if such committee exists).

Under proposed BOX Rule, Chapter XI, Sec. 10(b)(2)(g), a participant, upon a customer's written instructions, may hold mail for a customer who will not be at his or her usual address for no longer than two months if the customer is on vacation or traveling, or for three months if the customer is going abroad. This provision would help ensure that participants that hold mail, for customers who are away from their usual addresses, do so only pursuant to the customer's written instructions and for a specified, relatively short period of time.[23]

Proposed BOX Rule, Chapter XI, Sec. 10(b)(3) would require that, before a customer options order is executed, the account name or designation must be placed upon the memorandum for each transaction. In addition, only a qualified ROSFP would be permitted to approve any changes in account names or designations. The ROSFP would be required to document the essential facts relied upon in approving the changes and maintain the record in an easily accessible place. A participant would be required to preserve any documentation which provides for an account designation change for a period of not less than three years, with the documentation preserved for the first two years in an easily accessible place, as the term ''easily accessible place'' is used in Rule17a–4 of the Act. The Exchange believes the proposed rule would help to protect account name and designation information from possible fraudulent activity.[24]

Proposed BOX Rule, Chapter XI, Sec. 12(d) would allow a participant to exercise time and price discretion on orders for the purchase or sale of a definite number of options contracts in a specified security. The Exchange proposes to limit the duration of this discretionary authority to the day it is granted, absent written authorization to the contrary. Additionally, the proposed rule would require any exercise of time and price discretion to be reflected on the customer order ticket. The proposed one-day limitation would not apply to time and price discretion exercised for orders effected with or for an institutional account (as defined in the Rule) pursuant to valid Good-Till-Cancelled instructions issued on a ''not held'' basis. The Exchange believes that investors will receive greater protection by clarifying the time such discretionary orders may remain pending.[25]

The Exchange believes the proposed rule changes recognize that options have become more integrated with other securities in the implementation of particular strategies, and thus should not continue to be regulated as though they are a new and experimental product. The Exchange further asserts that the supervisory and compliance structure in place for non-options products at most participant firms is not materially different from the structure in place for options. The proposed rule change would also provide conformity of the BOX Rules to those of the CBOE. Accordingly, the Exchange submits that the proposed rule changes are appropriate and would not materially alter the supervisory operations of participants.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[26] in general, and Section 6(b)(5) of the Act,[27] in particular, in that it will result in consistency and uniformity among the competing options exchanges and it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, the Exchange believes this proposed rule change would achieve these ends by integrating the supervision and compliance functions relating to

[21] Proposed BOX Rule, Chapter XI, Sec. 10(f) is modeled after NYSE Rules 342.25 and 342.26.

[22] Proposed BOX Rule, Chapter XI, Sec. 10(g)(5) is modeled after NASD Rule 3013 and NYSE Rule 342.30(e).

[23] Proposed BOX Rule, Chapter XI, Sec. 10(b)(2)(g) is modeled after NASD Rule 3110(i).

[24] Proposed BOX Rule, Chapter XI, Sec. 10(b)(3) is modeled after NASD Rule 3110(j).

[25] Proposed BOX Rule, Chapter XI, Sec. 12(d) is modeled after NASD Rule 2510(d)(1).

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(5).

participants' public customer options activities into their overall supervisory structure, thereby eliminating any uncertainty over where supervisory responsibility lies, and by fostering the strengthening of participant organizations' internal controls and supervisory systems.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *http://www.sec.gov/rules.sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BSE–2008–29 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BSE–2008–29. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of BSE, located at 100 Franklin Street, Boston, MA 02110. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2008–29 and should be submitted on or before August 20, 2008.

IV. Commission Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[28] In particular, the Commission believes that the proposed rule change would help to better integrate the supervisory and compliance functions of a firm's public customer options activities into the firm's overall supervisory and compliance functions, thereby eliminating any uncertainty about where supervisory responsibility lies. Therefore, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[29] which requires, among other things, that Exchange rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission also finds good cause to approve the proposed rule change prior to the thirtieth day after the date of publication of notice of filing in the **Federal Register**. The proposed rule change is substantially similar to recent CBOE and FINRA rule amendments concerning options supervision, which were approved by the Commission.[30] The Commission believes that approving the proposed rule change will simplify firms' compliance, and is consistent with the public interest and the investor protection goals of the Act. Finally, the Commission finds that it is in the public interest to approve the proposed rule change as soon as possible to expedite its implementation.

Accordingly, the Commission believes good cause exists, consistent with Sections 19(b)(2) of the Act,[31] to approve the proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–BSE–2008–29) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–17428 Filed 7–29–08; 8:45 am]

BILLING CODE 8010–01–P

[28] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78f(b)(4).

[30] *See* Securities Exchange Act Release No. 56971 (December 14, 2007), 72 FR 72804 (December 21, 2007) (approval order for File No. SR–CBOE–2007–106) and Securities Exchange Act Release No. 57775 (May 5, 2008) 73 FR 26453 (May 9, 2008) (approval order for File No. SR–FINRA–2007–035).

[31] 15 U.S.C. 78s(b)(2).

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58215; File No. SR–FINRA–2008–035]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to the Addition of Fees Imposed for the Series 14 and Series 16 Examinations to FINRA's Fee Schedule

July 23, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 26, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend Section 4(c) of Schedule A to the FINRA By-Laws (''Schedule A'') to add the fees

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

charged for the Series 14 and Series 16 examinations. The text of the proposed rule change is available at FINRA, the Commission's Public Reference Room, and *http://www.finra.org/RulesRegulation/RuleFilings/index.htm.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. FINRA has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On July 30, 2007, NASD and the New York Stock Exchange (''NYSE'') consolidated their member firm regulation operations into a combined organization, FINRA. As part of the consolidation, FINRA assumed ownership of the Series 14 (Compliance Official) and Series 16 (Supervisory Analyst) examinations.[3] Thus, as of July 30, 2007, these two examinations became FINRA examinations and ceased being NYSE examinations, and FINRA retained the entire fee for those examinations.[4] The proposed rule change would add the fee for these two examinations to the fee table in Schedule A. The proposed rule change does not change the fee charged for either of these examinations. The fee for the Series 14 examination remains $300,[5] and the fee for the Series 16 examination remains $200.[6]

Because the proposed rule change does not change the amount of the examination fees for the Series 14 or Series 16, FINRA believes that it is appropriate for the amendments to Schedule A to have a retroactive effective date of July 30, 2007, the date FINRA assumed ownership of the two examinations. As noted above, the proposed rule change will have no effect on the amount of the fee for either the Series 14 or the Series 16 examination. Moreover, the retroactive effective date will not affect the fee paid by individuals who have already taken the exams.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[7] which require, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. Because FINRA now owns the Series 14 and Series 16 examinations, FINRA believes that it is appropriate to reflect the fees charged in connection with those examinations in the fee table in Schedule A.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2008–035 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2008–035. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2008–035 and should be submitted on or before August 20, 2008.

IV. Commission's Findings and Order Granting Accelerated Approval

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of Section 15 of the Act[8] and the rules and regulations thereunder applicable to a national securities association.[9] In particular, the Commission finds that the proposed rule change is consistent with Section

[3] As part of the consolidation, FINRA also assumed sole ownership of the Series 7 (General Securities Representative), Series 86 (Research Analyst—Analysis), and Series 87 (Research Analyst—Regulatory) examinations. Before the consolidation, the Series 7 examination was owned by NYSE, and the Series 86 and Series 87 examinations were jointly owned by NASD and NYSE. The fees for the Series 7, Series 86, and Series 87 examinations are already listed in Schedule A as required fees to be paid by FINRA members because, prior to the closing of the consolidation, the examination was either owned in part by NASD or required by NASD rules.

[4] Prior to the consolidation, NASD, which administered the examinations and collected the entire fee for the examinations, and NYSE, which owned or co-owned the examinations, each received a portion of the examination fee for the Series 7, Series 14, Series 16, Series 86, and Series 87 examinations. Following the consolidation, as the sole owner of these examinations, FINRA has retained the entire examination fee.

[5] The $300 fee for the Series 14 examination has been in place since 2001. *See* Securities Exchange Act Release No. 44296 (May 11, 2001), 66 FR 27714 (May 18, 2001) (SR–NYSE–2001–09).

[6] The $200 fee for the Series 16 examination has been in place since 1998. *See* Securities Exchange Act Release No. 40731 (December 1, 1998), 63 FR 67964 (December 9, 1998) (SR–NYSE–98–39).

[7] 15 U.S.C. 78*o*–3(b)(5).

[8] 15 U.S.C. 78*o*–3.

[9] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

15A(b)(5) of the Act,[10] which requires that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which FINRA operates or controls.

The Commission believes that FINRA's proposed rule change is consistent with Section 15A(b)(5) of the Act[11] because it would clarify in FINRA's fee schedule the fees that FINRA charges for the Series 14 and Series 16 examinations. The Commission notes that the proposal, while adding references to the fees for the Series 14 and Series 16 examinations to FINRA's Schedule A, would not change the amount of the fees charged to persons who take these exams. Rather, the Commission notes, the proposed rule change simply would reflect the fact that FINRA, and not NYSE, is now the owner of these examinations and therefore it must incorporate the fees in its fee schedule. The Commission also believes that it is appropriate to approve these changes retroactive to July 30, 2007, because that is the date on which FINRA assumed ownership of these examinations as a result of the consolidation. The Commission notes that FINRA has represented that the retroactive effective date would not affect the fees paid by individuals who have already taken these examinations.

FINRA has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of the notice thereof in the **Federal Register**. As noted above, the proposed rule change would not change the amount charged for either the Series 14 or 16 examinations, but would clarify the fees charged by FINRA for these examinations by including these fees on FINRA's fee schedule. The Commission believes that granting accelerated approval of the proposed rule change would reduce any possible confusion about the applicable fees for these examinations and would allow persons currently seeking to take these examinations to determine more easily the applicable fees. Accordingly, the Commission believes that there is good cause, consistent with Sections 15A(b)(5) and 19(b) of the Act,[12] to approve the proposed rule change on an accelerated basis.

[10] 15 U.S.C. 78*o*–3(b)(5).

[11] 15 U.S.C. 78*o*–3(b)(5).

[12] 15 U.S.C. 78*o*–3(b)(5), and 78s(b).

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (File No. SR–FINRA–2008–035) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–17410 Filed 7–29–08; 8:45 am]

BILLING CODE 8010–01–P

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58216; File No. SR–ISE–2008–57]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee Waivers

July 23, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 17, 2008, International Securities Exchange, LLC (the ''ISE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been substantially prepared by the Exchange. The ISE filed the proposal pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend its Schedule of Fees by adopting additional fee waivers related to the execution on ISE of public customer orders exposed to members before those orders are sent out for execution on another exchange through the intermarket linkage (''Linkage''). The text of the proposed rule change is available at the Exchange, *http://www.ise.com*, and the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Before a Primary Market Maker (''PMM'') sends a customer order through the Linkage when ISE is not at the national best bid or offer (''NBBO''), the Exchange exposes these customer orders to all its members to give them an opportunity to match the NBBO.[5] This exposure is intended to allow ISE to retain more flow by giving these customer orders additional opportunity to be executed at the NBBO at ISE, which also reduces PMM costs by reducing the number of Linkage orders they must send to other exchanges on behalf of customer orders.

Specifically, before the PMM sends a Linkage Order on behalf of a public customer, the public customer order is exposed at the NBBO price for a period established by the Exchange not to exceed one second. During this exposure period, Exchange members may enter responses up to the size of the order being exposed in the regular trading increment applicable to the option. If at the end of the exposure period, the order is executable at the then-current NBBO and the ISE is not at the then-current NBBO, the order is executed against responses that equal or better the then-current NBBO. The exposure period is terminated if the exposed order becomes executable on the ISE at the prevailing NBBO or if the Exchange receives an unrelated order that could trade against the exposed order at the prevailing NBBO price. If, after an order is exposed, the order is not executed in full on the Exchange at the then-current NBBO or better, and it

[5] *See* Securities Exchange Act Release No. 58038 (June 26, 2008), 73 FR 38261 (July 3, 2008) (SR–ISE–2008–50) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Exposure of Public Customer Orders to all ISE Members).

is marketable against the then-current NBBO, the PMM sends a Linkage Order on the customer's behalf for the balance of the order as provided in Rule 803(c)(2)(ii). If the balance of the order is not marketable against the then-current NBBO, it is placed on the ISE book.

ISE currently charges a customer fee in options on Premium Products [6] and in Second Market [7] options; customer fees on all other options are currently waived by the Exchange. To encourage ISE members to respond to the exposure of these public customer orders, the Exchange proposes to waive customer fees in options on Premium Products and in Second Market options incurred by members who step up and match or improve the NBBO during the exposure period so these public customer orders can be executed on the Exchange.[8] With this filing, the Exchange is also proposing to clarify on its Schedule of Fees that the fee waiver is applicable to orders exposed pursuant to Supplementary Material .02 to ISE Rule 803 rather than to Linkage Orders.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the proposed rule change will allow ISE to retain more flow by giving these customer orders additional opportunity to be executed at the NBBO at ISE and will also reduce PMM costs by reducing the number of Linkage orders they must send to other exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[6] Premium Products is defined in the Schedule of Fees as the products enumerated therein.

[7] *See* ISE Rule 900.

[8] ISE recently adopted fee waivers for Firm Proprietary, ISE Market Maker and Payment for Order Flow fees incurred by members who step up and match or improve the NBBO during the exposure period. *See* Securities Exchange Act Release No. 58164 (July 15, 2008), 73 FR 42638 (July 22, 2008) (SR–ISE–2008–56). This filing extends that waiver to apply to customer orders in Premium Products and in Second Market options. The Exchange represents that, since July 1, 2008, the date SR–ISE–2008–56 was filed and became operative, no customer orders have responded during the exposure period and thus, no customer orders were deprived of the proposed fee waiver.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b-4(f)(2) thereunder,[10] because it establishes or changes a due, fee, or other charge imposed on members by ISE. Accordingly, the proposal is effective upon filing with the Commission. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2008–57 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2008–57. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2008–57 and should be submitted on or before August 20, 2008.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b-4(f)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–17411 Filed 7–29–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58224; File No. SR–ISE–2007–94]

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Granting Accelerated Approval of a Proposed Rule Change as Modified by Amendments No. 1 and 3 Thereto Relating to Reduction of Certain Order Handling and Exposure Periods From Three Seconds to One Second

July 25, 2008.

I. Introduction

On October 5, 2007, the International Securities Exchange, LLC ("ISE" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to reduce certain order exposure times from three seconds to one second. On December 4, 2007, ISE filed Amendment

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(l).

[2] 17 CFR 240.19b–4.

No. 1 to the proposed rule change. On May 22, 2008, ISE filed Amendment No. 2 to the proposed rule change and withdrew this Amendment on May 29, 2008. On June 23, 2008, ISE filed Amendment No. 3 to the proposed rule change. The proposed rule change, as modified by Amendments No. 1 and 3, was published for comment in the **Federal Register** on July 3, 2008.[3] The Commission received one comment on the proposal.[4] This order approves the proposed rule change, as modified by Amendments No. 1 and 3, on an accelerated basis.

II. Description of the Proposal

The Exchange proposes to reduce the order handling and exposure periods contained in Exchange Rules 716 (Block Trades), 717 (Limitations on Orders), 723 (Price Improvement Mechanism for Crossing Transactions), and 811 (Directed Orders) from three seconds to one second.

Rule 716 contains the requirements applicable to the execution of orders using the Block Order Mechanism, Facilitation Mechanism, and Solicited Order Mechanism. The Block Order Mechanism allows members to obtain liquidity for the execution of a block-size order, whereas the Facilitation and Solicited Order Mechanisms allow members to enter block-size cross transactions. Rule 723 contains the requirements applicable to the execution of orders using the Price Improvement Mechanism (''PIM''). The PIM allows members to enter cross transactions of any size. Orders entered into any of these mechanisms currently are exposed to all market participants for three seconds, giving participants an opportunity to enter additional trading interest before the orders are automatically executed.

Rule 717 requires members to expose agency orders to the marketplace before executing them as principal[5] or executing them against orders solicited from other members.[6] Under Rule 717, an order can be exposed either by entering it onto the Exchange and waiting at least three seconds before entering the contra-side proprietary or solicited order, or by utilizing the various mechanisms that have an exposure period built into the functionality.

Rule 811 contains the requirements applicable to the handling and execution of Directed Orders. A Directed Market Maker is required to enter Directed Orders into the PIM or release the order to the Exchange's limit order book within three seconds of receipt.[7] Additionally, there are three instances when a Directed Order is exposed to all market participants for three seconds after being released to the Exchange's limit order book: (i) Before a Directed Order is matched against the Directed Market Maker at the national best bid or offer (''NBBO''); [8] (ii) before executing a Directed Order against the Directed Market Maker's Guarantee; [9] and (iii) before being given to the Primary Market Maker for handling where the Directed Market Maker is also the Primary Market Maker.[10] Finally, if a Directed Order is placed on the Exchange's limit order book, the Directed Market Maker is not permitted to enter a proprietary order to execute against the Directed Order during the three seconds following the release of the Directed Order.

Under the proposal, all of the three-second exposure periods referred to above would be reduced to one second.

The Commission received one comment letter regarding the proposed rule change.[11] The commenter expresses concern that the combined effect of the proposed rule change and another ISE proposal[12] would lead to greater rates of internalization and reduced amounts of price improvement being made available to public customers on ISE, especially to small orders under 50 contracts.[13]

III. Discussion and Commission Findings

After carefully reviewing the proposed rule change and the comment submitted, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[14] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[15] which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[16] which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that, given the electronic environment on ISE, reducing each of the exposure periods from three seconds to one second as proposed could facilitate the prompt execution of orders, while continuing to provide market participants with an opportunity to compete for exposed bids and offers. To substantiate that ISE members could receive, process, and communicate a response back to the Exchange within one second, the Exchange stated that it distributed a survey to ISE members that regularly participate in orders executed through the mechanisms that would be affected by the proposal. ISE stated that the survey results indicated that it typically takes, at most, 110 milliseconds, for members to receive, process, and

[3] *See* Securities Exchange Act Release No. 58041 (June 26, 2008), 73 FR 38263 (''Notice'').

[4] *See* letter from Lisa J. Fall, General Counsel, Boston Options Exchange (''BOX''), to Nancy M. Morris, Secretary, Commission, dated May 14, 2008 (''BOX Comment'').

[5] Rule 717(d).

[6] Rule 717(e). The Exchange proposes to make a non-substantive clean-up of Rule 717(e) to specify that members can use the Facilitation Mechanism to execute solicited crosses. The Facilitation Mechanism rule was amended earlier this year to allow members to enter solicited crosses, and Rule 717(e) should have been updated at that time. *See* Securities Exchange Act Release No. 55557 (March 29, 2007), 72 FR 16838 (April 5, 2007).

[7] Rule 811(c)(3). If the Directed Market Maker fails to do so within three seconds, the Exchange's system automatically releases the order. Rule 811(c)(3)(ii).

[8] If a Directed Market Maker is quoting at the NBBO at the time it releases a Directed Order, the Directed Market Maker is last in priority, and the order is exposed to all market participants before the Directed Order is executed against the Directed Market Maker's quote.

[9] If the Directed Market Maker is quoting at the NBBO on the opposite side of the market from a Directed Order at the time the Directed Order is received by the Directed Market Maker, and the Directed Order is marketable, the Exchange's system will automatically guarantee execution of the Directed Order against the Directed Market Maker at the price and the size of the Directed Market Maker's quote. Rule 811(d).

[10] As provided in Rule 714, when the Exchange's best bid or offer is inferior to another exchange, incoming marketable customer orders are handled by the Primary Market Maker pursuant to Rule 803(c), which requires the Primary Market Maker to either execute the order at a price that matches the NBBO or attempt to obtain the better price for the customer according to the Linkage rules contained in Chapter 19.

[11] *See* BOX Comment, *supra* note 4.

[12] The BOX Comment, *supra* note 4, was submitted in connection with SR–ISE–2008–29. In SR–ISE–2008–29, the ISE proposed to allow members to enter orders into the PIM at a price that matches the NBBO when the ISE market is inferior to the NBBO. The Commission approved SR–ISE–2008–29. *See* Securities Exchange Act Release No. 57847 (May 21, 2008), 73 FR 30987 (May 29, 2008).

[13] *See* BOX Comment, *supra* note 4.

[14] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(8).

respond to broadcast messages related to the various mechanisms. According to the ISE, members who responded to the survey also indicated that reducing the exposure period to one second would not impair their ability to participate in orders executed through the mechanisms.[17] Accordingly, the Commission believes that it is consistent with the Act for ISE to reduce the order handling and exposure times discussed herein from three seconds to one second.

The Commission does not agree with the concerns raised by the commenter. Based on the ISE's statements regarding the survey results, the Commission believes that market participants should continue to have opportunities to compete for exposed bids and offers within a one second exposure period.

The Commission finds good cause to approve the proposed rule change prior to the thirtieth day after publication for comment in the **Federal Register**. The Commission notes that the proposed rule change was noticed for the full comment period and no additional comments were received.[18] The Commission also notes that the proposed rule change is substantially similar to a recently approved proposal submitted by the Chicago Board Options Exchange, Incorporated [19] and the Commission believes that ISE has provided reasonable support for ISE's belief that ISE market participants would continue to have an opportunity to compete for exposed bids and offers if exposure periods were reduced to one second. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[20] to approve the proposed rule change on an accelerated basis.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[21] that the proposed rule change (SR–ISE–2007–94), as modified by Amendments No. 1 and 3, be, and hereby is, approved on an accelerated basis.

[17] The ISE stated that all of the eight members that responded to the specific timing questions, and two of the three members that did not answer the specific timing questions, indicated that reducing the crossing exposure timer to one second would not impair their ability to participate in ISE crossing orders. The ISE stated that one member responded that it could not measure the specific times and indicated that it would prefer to keep the exposure periods at three seconds. *See* Notice.

[18] The BOX Letter was received prior to the publication of the Notice. *See* BOX Comment, *supra* note 4.

[19] *See* Securities Exchange Act Release No. 58088 (July 2, 2008), 73 FR 39747 (July 10, 2008).

[20] 15 U.S.C. 78s(b)(2).

[21] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–17440 Filed 7–29–08; 8:45 am]

BILLING CODE 8010–01–P

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58217; File No. SR–NSX–2008–12]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide for a Post Intermarket Sweep Order

July 24, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 18, 2008, National Stock Exchange, Inc. (''NSX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. NSX filed the proposal pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend NSX Rule 11.11(c)(8) to allow ETP Holders the option of designating an intermarket sweep order (''ISO'') as a ''Post Intermarket Sweep Order'' (''Post ISO''). The text of the proposed rule change is below. Proposed new language is in italics, and the proposed deletions are enclosed in brackets:

Rules of National Stock Exchange, Inc.

Chapter XI. Trading Rules

* * * * *

Rule 11.11. Orders and Modifiers

Users may enter into the System the types of orders listed in this Rule 11.11, subject to the limitations set forth in this Rule or elsewhere in these Rules.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

(a)–(b) No change.

(c) Other Types of Orders and Order Modifiers.

(1)–(7) No change.

(8) [Incoming] Intermarket Sweep Order *(''ISO'')*.

(i) Incoming ISO. The System will accept incoming intermarket sweep orders (as such term is defined in Regulation NMS) from other trading centers. In order to be eligible for treatment as an intermarket sweep order, the order must be marked ''ISO,'' and the User entering the order must simultaneously route one or more additional limit orders marked ''ISO,'' as necessary, to away markets to execute against the full displayed size of any protected quotation for the security with a price that is superior to the limit price of the intermarket sweep order entered in the System. Such orders, if they meet the requirements of the foregoing sentence, will be considered immediate-or-cancel (IOC) and will be executed without regard to protected quotations at away markets consistent with Regulation NMS.

(ii) Post ISO. A User may designate an ISO as a ''Post ISO.'' In order to be eligible for treatment as a Post ISO, the order must be marked ''Post ISO,'' and in submitting such an order the User entering the order represents that such User has simultaneously routed one or more additional limit orders marked ''ISO,'' as necessary, to away markets to execute against the full displayed size of any protected quotation for the security with a price that is superior or equal to the limit price of the Post ISO entered in the System. Such order, if it meets the requirements of the foregoing sentence and is not a Post Only Order pursuant to Rule 11.11(c)(5), will be executed without regard to protected quotations at away markets consistent with Regulation NMS by sweeping the NSX Book up to and including its limit price. A Post ISO which is designated by the User as a Post Only Order pursuant to Rule 11.11(c)(5) will be rejected without execution if, when entered, it is immediately marketable against displayed orders in the NSX Book. Any unfilled portion of a Post ISO that meets the requirements of Rule 11.22(d)(3) will be posted at the entered limit price.

(9) No change.

(d) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend Exchange Rules 11.11(c)(8) to allow ETP Holders the option of posting an order designated as an ISO.

Under current Rule 11.11(c)(8), the System will accept incoming intermarket sweep orders (as such term is defined in Regulation NMS) from other trading centers. In order to be eligible for treatment as an intermarket sweep order, the order must be marked ''ISO,'' and the User entering the order must simultaneously route one or more additional limit orders marked ''ISO,'' as necessary, to away markets to execute against the full displayed size of any protected quotation for the security with a price that is superior to the limit price of the intermarket sweep order entered in the System. Such orders, if they meet the requirements of the foregoing sentence, will be considered immediate-or-cancel (IOC) and will be executed without regard to protected quotations at away markets consistent with Regulation NMS.

Under the proposed rule change, by designating an ISO as a ''Post ISO,'' the ETP Holder represents to the Exchange that the ETP Holder has simultaneously routed one or more additional limit orders marked ''ISO,'' as necessary, to away markets to execute against the full displayed size of any protected quotation for the security with a price that is superior or equal to the limit price of the intermarket sweep order entered in the System. The incoming Post ISO (unless marked ''post only'') will sweep the NSX Book up to its limit price. Unlike a standard ISO (which is considered IOC), if residual shares of the Post ISO are available, they will be posted at the entered limit price (similar to existing ''Sweep and Post'' orders under Rule 11.11(c)(7)(ii)(A)). Any unfilled portion of a Post ISO order following the sweep of the NSX Book will be posted in the NSX Book and will be ineligible for routing.

If an incoming Post ISO is marked as ''Post Only'' pursuant to Rule 11.11(c)(5) and is marketable (within NSX), it will be rejected. Otherwise, Post Only Post ISOs will be accepted and posted in the NSX Book at its limit price providing liquidity.

Similar to ISOs under the current Rules, Users sending a Post ISO must simultaneously route one or more additional limit orders marked ''ISO,'' as necessary, to away markets to execute against the full displayed size of any protected quotation for the security with a price that is superior or equal to the limit price of the intermarket sweep order entered in the System in accordance with Regulation NMS' Order Protection Rule Rules 610 and 611. Post ISOs may therefore lock or cross protected quotes at away market centers that were sent ISOs equal to the limit price, consistent with Rule 11.22(d)(3), but may not lock or cross the NSX Top of Book, and are not routable, subject to their compliance with this rule and Rule 11.22(d)(3).

Post ISOs may be entered as odd, round or mixed lots. Only displayed orders (and displayed orders with reserves) may be designated as Post ISOs. Post ISO for Order Delivery will be processed in the same way as other order types supported today.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(5) of the Act,[6] in particular, which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange states that written comments on the proposed rule change were neither solicited nor received.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[9] Previously, the Commission approved an order type similar to the one proposed,[10] and this proposal does not raise any novel issues. For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange fulfilled this requirement.

[9] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] *See* Securities Exchange Act Release No. 54549 (September 29, 2006), 71 FR 59179 (October 6, 2006) (SR–NYSEArca–2006–59) (approving NYSE Arca Equities Rule 7.31(w)).

including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NSX–2008–12 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2008–12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–2008–12 and should be submitted on or before August 20, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–17412 Filed 7–29–08; 8:45 am]

BILLING CODE 8010–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 58218; File No. SR–Phlx–2008–57]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Technical Amendments to Its Certificate of Incorporation and By-Laws

July 24, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 23, 2008, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been substantially prepared by the Phlx. The Exchange has designated this proposal as one concerned solely with the administration of the Exhange under section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(3) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx, pursuant to section 19(b)(1) of the Act [5] and Rule 19b–4 thereunder,[6] proposes to make minor technical amendments to its Certificate of Incorporation (''Certificate'') and By-Laws.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.phlx.com/regulatory/reg_rulefilings.aspx* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to make minor technical changes to the Exchange's Certificate to conform the Certificate with changes that were requested by the Delaware Department of State. The Exchange also proposes to make related changes to its By-Laws. Specifically, the Exchange proposes to delete the words ''Second Restated'' in the title of the Exchange's Certificate, which currently reads ''Second Restated Certificate of Incorporation of Philadelphia Stock Exchange, Inc.'' and corresponding references in Article Fourth and By-Law Article 1, section 1–1(b). The Exchange also proposes to correct the name of the Exchange's registered agent and to delete the last paragraph of the Certificate beginning with ''IN WITNESS WHEREOF'' and the execution line.

The Exchange recently received Commission approval to amend its governing documents in connection with the acquisition of Phlx by The NASDAQ OMX Group, Inc.[7] In connection with filing the Exchange's amended Certificate with the State of Delaware, the Exchange received requested changes from the Delaware Department of State. This proposed rule change incorporates those changes and makes corresponding changes to the Exchange's By-Laws.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act [8] in general, and furthers the objectives of sections 6(b)(1) of the Act [9] in particular, in that it is designed to enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Act, the rules and regulations thereunder, and Exchange rules.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

[5] 15 U.S.C. 78s(b)(1).

[6] 17 CFR 240.19b–4.

[7] *See* Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR–Phlx–2008–31); and 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR–NASDAQ–2008–035). These proposed rule changes, as well as this proposed rule change, are scheduled to become operative upon consummation of the merger.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(1).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

II. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(iii) of the Act [10] and paragraph (f)(3) of Rule 19b–4 [11] thereunder because it is concerned solely with the administration of the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2008–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number *SR–Phlx–2008–57*. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR–Phlx–2008–57* and should be submitted on or before August 20, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–17413 Filed 7–29–08; 8:45 am]

BILLING CODE 8010–01–P

10 15 U.S.C. 78s(b)(3)(A)(iii).

11 17 CFR 240.19b–4(f)(3).

12 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2008–0042]

Privacy Act of 1974, as Amended; Computer Matching Program (SSA/Railroad Retirement Board (RRB))—Match Number 1006

AGENCY: Social Security Administration (SSA).

ACTION: Notice of the renewal of an existing computer matching program, which is scheduled to expire on October 4, 2008.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces the renewal of an existing computer matching program that SSA is currently conducting with the RRB.

DATES: SSA will file a report of the subject matching program with the Committee on Homeland Security and Governmental Affairs of the Senate; the Committee on Oversight and Government Reform of the House of Representatives, and the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). The renewal of the matching program will be effective as indicated below.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 965–0201 or writing to the Deputy Commissioner for Budget, Finance and Management, 800 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. All comments received will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: The Deputy Commissioner for Budget, Finance and Management as shown above.

SUPPLEMENTARY INFORMATION:

A. General

The Computer Matching and Privacy Protection Act of 1988 (Pub. L.) 100–503), amended the Privacy Act (5 U.S.C. 552a) by describing the conditions under which computer matching involving Federal government could be performed and adding certain protections for individuals applying for, and receiving, Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) further amended the Privacy Act regarding protections for such individuals.

The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, State, or local government records. It requires Federal agencies involved in computer matching programs to:

(1) Negotiate written agreements with the other agency or agencies participating in the matching programs;

(2) Obtain the approval of the matching agreement by the Data Integrity Boards (DIB) of the participating Federal agencies;

(3) Publish notice of the computer matching program in the **Federal Register**;

(4) Furnish detailed reports about matching programs to Congress and OMB;

(5) Notify applicants and beneficiaries that their records are subject to matching; and

(6) Verify match findings before reducing, suspending, terminating, or denying an individual's benefits or payments.

B. SSA Computer Matches Subject to the Privacy Act

We have taken action to ensure that all of SSA's computer matching programs comply with the requirements of the Privacy Act, as amended.

Dated: July 11, 2008.

Mary Glenn-Croft,

Deputy Commissioner for Budget, Finance and Management.

Notice of Computer Matching Program, Social Security Administration (SSA) With the Railroad Retirement Board (RRB)

A. Participating Agencies

SSA and RRB.

B. Purpose of the Matching Program

The purpose of this matching program is to establish the conditions, safeguards and procedures under which the RRB agrees to disclose RRB annuity payment data to the SSA. This disclosure will provide SSA with information necessary to verify Supplemental Security Income (SSI) program and Special Veterans Benefits (SVB) eligibility and benefit payment amounts. It also helps to ensure that correct recording on the Supplemental Security Income Record (SSR) of railroad annuity amounts paid to SSI and SVB recipients by RRB. The SSI program provides payments to aged, blind and disabled recipients with income and resources at or below levels established by law and regulations. The SVB program provides similar benefits to certain World War II veterans.

C. Authority for Conducting the Matching Program

The legal authority for the SSI portion of this matching program is contained in sections 1631(e)(1)(A) and (B) and 1631(f) of the Social Security Act (''the Act''), (42 U.S.C. 1383 (e)(1)(A) and (B) and 1383(f)). The legal authority for the SVB portion of this matching program is contained in section 806(b) of the Act, (42 U.S.C. 1006 (b)).

D. Categories of Records and Individuals Covered by the Matching Program

On the basis of certain identifying information as provided by SSA to RRB, RRB will provide SSA with electronic files containing annuity payment data from RRB's system of records, RRB–22 Railroad Retirement, Survivor, and Pensioner Benefits System, entitled Checkwriting Integrated Computer Operation (CHICO) Benefit Payment Master. SSA will then match the RRB data with data maintained in the SSR, SSA/OASSIS, 60–0103 system of records. SVB data also resides on the SSR.

E. Inclusive Dates of the Matching Program

The matching program will become effective no sooner than 40 days after notice of the matching program is sent to Congress and OMB, or 30 days after publication of this notice in the **Federal Register**, whichever date is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. E8–17442 Filed 7–29–08; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 6304]

Notice of Disposition of Electronic Scanning and Storage of Certain Nonimmigrant Records

SUMMARY: The Department has determined that electronic scanned records of Category I nonimmigrant visa refusals and nonimmigrant visa applications (Form DS–156 [OMB–1405–018]) are to be treated as the official or original records of the Department of State. In accordance with The Government Paperwork Elimination Act (GPEA), the Department's scanned records are not to be denied legal effect, validity, or enforceability merely because they are in electronic form.

In October 21, 1998, Congress enacted the Government Paperwork Elimination Act (GPEA) which required, when practicable, Federal agencies to use electronic processes to conduct agency business. The purpose of the GPEA was to preclude agencies or courts from systematically treating electronic documents and signatures less favorably than their paper counterparts. In accordance with the GPEA, the Department of State launched the electronic scanning initiative in October 2001, which began the scanning of Category I nonimmigrant visa refusal paper records at selected posts. By May 2004, the Department of State expanded this scanning initiative to all posts. As of March 31, 2008, the Department has maintained the scanning of all Category I nonimmigrant visa refusal paper records and has also expanded its scanning initiative to include the scanning of nonimmigrant visa applications (Form DS–156 [OMB–1405–0018]) at selected high-volume posts.

By expanding the scanning initiative, the Department of State seeks to:

- Reduce costs associated with physical storage and improve access to these records with an electronic information management (EIM) interface.
- Manage millions of records and retrieve the ones that are needed expeditiously.
- Share documents with other offices or access them remotely while protecting confidential information.
- Create reports relating to case management, workload, and level-of-effort quantifications.

Will these records be considered ''official'' for all purposes?

Yes. Since the scanned, electronically stored records replicates the original paper documents, the scanned versions are to be considered the official or original records for all legal and other purposes.

What are ''Category I'' records?

Generally, but not always, Category I refusals are permanent in nature, as opposed to Category II refusals that are based on circumstances that may change and allow an applicant to overcome his or her visa ineligibility.

For example, a case involving a person convicted of a crime involving moral turpitude would be entered as a Category I refusal because the basis for the finding of ineligibility is predicated on a permanent condition, i.e., the conviction. However, the case of a person who is determined by a consular officer to be ineligible for a visa as a result of having incurred one year or more of unlawful presence in the United States would be entered as a Category II refusal because an ineligibility on that ground remains in effect for ten years following the person's departure or removal from the United States, and thereafter would not provide a basis for a refusal.

Under what authority is the Department of State converting these records?

Section 1732 of Title 28 of the United States Code (Record made in regular course of business; photographic copies) establishes the admissibility of electronic (copied) documents.

Is the electronic conversion of these documents temporary or permanent?

The Department has determined that the electronic conversion of Category I records is to be permanent.

Will these records be readily available for review?

No. In compliance with existing statutory requirements, these records are generally available only for internal use with respect to the issuance or denial of visas or permits to enter the United

States or shared with Executive Branch authorities charged with administrating or enforcing the laws of the United States exclusively for such purposes. Section 222(f) of the Immigration and Nationality Act stipulates that, except as it relates to the discretionary authority of the Secretary of State to provide information to a court or a foreign government, the records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States.

FOR FURTHER INFORMATION CONTACT: Partap Singh Verma, of the Office of Visa Services, U.S. Department of State, 2401 E. St., NW., L–603, Washington, DC 20522, who may be reached at (202) 663–1203.

Dated: July 21, 2008.

Janice Jacobs,

Assistant Secretary, Consular Affairs, Department of State.

[FR Doc. E8–17447 Filed 7–29–08; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending July 11, 2008

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2008–0213.

Date Filed: July 8, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: July 29, 2008.

Description: Application of Jet2.com Limited (''Jet2.com'') requesting issuance of a foreign air carrier permit to the full extent authorized by the Air Transport Agreement between the United States and the European Community and the Member States of the European Community (the ''US–EC Agreement'') to enable Jet2.com to engage in: (a) Foreign scheduled and charter air transportation of persons, property and mail from any point or points behind any Member State of the European Union, via any point or points in any Member State and via intermediate points to any point or points in the United States and beyond; (b) foreign scheduled and charter air transportation of persons, property and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area; (c) foreign scheduled and charter cargo air transportation between any point or points in the United States and any point or points; (d) other charters pursuant to prior approval; and (e) transportation authorized by any additional route rights made available to European Community carriers in the future (subject to the condition that, before Jet2.com commences any new service under this provision, it must provide the Department evidence that it holds a homeland license for that new service). Jet2.com also requests exemption authority to the extent necessary to enable it to hold out and provide the service described above pending issuance of a foreign air carrier permit and such additional or other relief as the Department may deem necessary or appropriate.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–17454 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending July 11, 2008

The following Agreements were filed with the Department of Transportation under the Sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1383 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: DOT–OST–2008–0218.

Date Filed: July 10, 2008.

Parties: Members of the International Air Transport Association.

Subject: Technical Correction: Mail Vote 572—Resolution 010b, TC3 Between South East Asia and South Asian, Subcontinent, Special Passenger Amending Resolution, from Viet Nam to South Asian Subcontinent (Memo 1222), *Intended effective date:* 1 August 2008.

Renee V. Wright

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E8–17449 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Application of Priester Aviation, LLC for Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order to Show Cause (Order 2008–7–0067); Dockets DOT–OST–2008–0066 and DOT–OST–2008–0067.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Priester Aviation, LLC, fit, willing, and able, and awarding it certificates of public convenience and necessity to engage in interstate and foreign charter air transportation of persons, property and mail.

DATES: Persons wishing to file objections should do so no later than August 8, 2008.

ADDRESSES: Objections and answers to objections should be filed in Dockets DOT–OST–2008–0066 and DOT–OST–2008–0067 and addressed to U.S. Department of Transportation, Docket Operations, (M–30, Room W12–140), 1200 New Jersey Avenue, SE., West Building Ground Floor, Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Damon D. Walker, Air Carrier Fitness Division (X–56, Room W86–465), U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–7785.

Dated: July 23, 2008.

Michael W. Reynolds,

Acting Assistant Secretary for Aviation and International Affairs.

[FR Doc. E8–17460 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Mike Monroney Aeronautical Center Environmental Assessment for the Facilities Master Plan; Oklahoma City, OK

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of public meeting.

SUMMARY: The Mike Monroney Aeronautical Center (MMAC) Federal Aviation Administration (FAA) announces a public meeting to obtain public comment on the MMAC Site Environmental Assessment for the Facilities Master Plan. The environmental assessment has been prepared in accordance with the National Environmental Policy Act (40 CFR parts 1500–1508) and FAA Order 1050.1E, Environmental Impacts: Policies and Procedures. The environmental assessment document can be reviewed at: *https://employees.faa.gov/org/centers/mmac/employee_services/amp/env/*. The public meeting will be conducted on Monday, July 28, 2008 at the Mike Monroney Aeronautical Center (6500 S. MacArthur Blvd., Oklahoma City, OK 73169) at 1:30 p.m. in Building 230.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Connell, Federal Aviation Administration, AMP–100, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169; telephone number 405–954–3503. Comments on the environmental assessment should also be submitted to the above office.

Interested persons are invited to comment on the environmental assessment. All comments will be considered by the FAA to the extent practicable.

Federal Aviation Administration, Mike Monroney Aeronautical Center, Office of Facility Management, AMP–1, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT**.

Issued in Oklahoma City, OK, July 16, 2008.

Charles T. Sullivan,

Program Director, Office of Facility Management AMP–1.

[FR Doc. E8–17263 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Meeting of the National Parks Overflights Advisory Group Aviation Rulemaking Committee

ACTION: Notice of meeting.

SUMMARY: The Federal Aviation Administration (FAA) and the National Park Service (NPS), in accordance with the National Parks Air Tour Management Act of 2000, announce the next meeting of the National Parks Overflights Advisory Group (NPOAG) Aviation Rulemaking Committee (ARC). This notification provides the dates, location, and agenda for the meeting.

Dates and Location: The NPOAG ARC will meet on September 3–4, 2008. The meeting will take place at the Red Lion Hotel, Port Angeles, WA. The hotel is located at 221 North Lincoln Street, Port Angeles, WA 98362. The hotel phone number is (360) 452–9215. The meetings will be held from 8 a.m. to 5 p.m. on September 3 and from 8 a.m. to 2 p.m. on September 4th. This NPOAG meeting will be conducted in closed session and is not open to the public.

FOR FURTHER INFORMATION CONTACT: Barry Brayer, AWP–1SP, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, P.O. Box 92007, Los Angeles, CA 90009–2007, telephone: (310) 725–3800, e-mail: *Barry.Brayer@faa.gov,* or Karen Trevino, National Park Service, Natural Sounds Program, 1201 Oakridge Dr., Suite 100, Fort Collins, CO 80525, telephone: (970) 225 3563, e-mail: *Karen_Trevino@nps.gov*.

SUPPLEMENTARY INFORMATION:

Background

The National Parks Air Tour Management Act of 2000 (NPATMA), enacted on April 5, 2000, as Public Law 106–181, required the establishment of the NPOAG within one year after its enactment. The Act requires that the NPOAG be a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairman of the advisory group.

The duties of the NPOAG include providing advice, information, and recommendations to the FAA Administrator and the NPS Director on: Implementation of Public Law 106–181; quiet aircraft technology; other measures that might accommodate interests to visitors of national parks; and at the request of the Administrator and the Director, on safety, environmental, and other issues related to commercial air tour operations over national parks or tribal lands.

Agenda for the September 3–4, 2008 NPOAG Meeting

The agenda for the meeting will include, but is not limited to, the following: Development of a Strategic Plan, review and approval of the meeting minutes from the September 25–26, 2007 NPOAG meeting in Fort Collins, CO; update on ongoing Air Tour Management Program projects; and NPOAG subgroup assignments.

Attendance at the Meetings

This NPOAG meeting will be conducted in closed session and will not be open to the public.

Issued in Hawthorne, CA, on July 23, 2008.

Barry S. Brayer,

Manager, Special Programs Office, Western-Pacific Region.

[FR Doc. E8–17390 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Modification of the Chicago, IL Class B Airspace Area; Public Meetings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meetings.

SUMMARY: This notice announces three fact-finding informal airspace meetings to solicit information from airspace users and others concerning a proposal to revise the Class B airspace area at Chicago, IL. The purpose of these meetings is to provide interested parties an opportunity to present views, recommendations, and comments on the proposal. All comments received during these meetings will be considered prior to any revision or issuance of a notice of proposed rulemaking.

Times and Dates: The informal airspace meetings will be held on Tuesday, September 23, 2008, from 2 p.m.–7 p.m., Wednesday, September 24, 2008, from 10 a.m.–2 p.m., and Thursday, September 25, 2008, from 2 p.m.–7 p.m. Comments must be received on or before October 2, 2008.

ADDRESSES: (1) The meeting on Tuesday, September 23, 2008, will be held at Signature Flight Center, Chicago Executive Airport, 1100 South Milwaukee Avenue, Wheeling, IL 60090. (2) The meeting on Wednesday, September 24, 2008, will be held at DuPage Flight Center, Chicago DuPage Airport, 2700 International Drive, West Chicago, IL 60185. (3) The meeting on Thursday, September 25, 2008, will be held at Signature Flight Center, Chicago Executive Airport, 1100 South Milwaukee Avenue, Wheeling, IL 60090.

Comments: Send comments on the proposal to: Don Smith, Manager, Operations Support Group, Air Traffic Organization Central Service Center, Federal Aviation Administration, 2601 Meacham Boulevard, Fort Worth, Texas, 76137, or by fax to (817) 222–5547.

FOR FURTHER INFORMATION CONTACT: Anne Hulsey, FAA Chicago TRACON, 1100 Bowes Road, Elgin, IL, 60123; Telephone (847) 608–5524.

SUPPLEMENTARY INFORMATION:

Meeting Procedures

(a) The meetings will be informal in nature and will be conducted by one or more representatives of the FAA Central Service Center. A representative from the FAA will present a formal briefing on the planned modification to the Class B airspace at Chicago, IL. Each participant will be given an opportunity to deliver comments or make a presentation. Only comments concerning the plan to modify the Class B airspace area at Chicago, IL, will be accepted.

(b) The meetings will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(c) Any person wishing to make a presentation to the FAA panel will be asked to sign in and estimate the amount of time needed for such presentation. This will permit the panel to allocate an appropriate amount of time for each presenter. These meetings will not be adjourned until everyone on the list has had an opportunity to address the panel.

(d) Position papers or other handout material relating to the substance of these meetings will be accepted. Participants wishing to submit handout material should present an original and two copies (3 copies total) to the presiding officer. There should be additional copies of each handout available for other attendees.

(e) These meetings will not be formally recorded.

Agenda for the Meetings

—Sign-in.
—Presentation of Meeting Procedures.
—FAA explanation of the planned Class B modifications.
—Solicitation of Public Comments.
—Closing Comments.

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

Issued in Washington DC, on July 23, 2008.

Stephen Rohring,

Acting Manager, Airspace and Rules Group.

[FR Doc. E8–17383 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Washington

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to the I–405, Tukwila to Renton Improvement Project (I–5 to SR 169—Phase 2) (The Project) located in Tukwila and Renton; King County; I–405 in the State of Washington. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on any of the listed highway projects will be barred unless the claim is filed on or before January 26, 2009. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Stephen Boch, Major Projects Oversight Manager, Federal Highway Administration, Jackson Federal Building, 915 2nd Avenue, Room 3142, Seattle, Washington, 98174; *telephone:* (206) 220–7356; and *e-mail: Steve.Boch@fhwa.dot.gov*. The FHWA Washington Division's Oversight Manager's regular office hours are between 8:00 a.m. and 4:30 p.m. (Pacific Time). You may also contact William Jordan, I–405 Environmental Manager, Washington State Department of Transportation, 600–108th Avenue, NE., Suite 405, Bellevue, Washington, 98004; *telephone:* (425) 456–8547; and *e-mail: William.jordan@i405.wsdot.wa.gov*. The I–405 Corridor Program's regular office hours are between 8 a.m. and 5 p.m. (Pacific Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of Washington: I–405, Tukwila to Renton Improvement Project (I–5 to SR 169—Phase 2). The Project extends approximately four miles along I–405, from I–5 to SR 169, and approximately two miles along SR 167, from I–405 to SW 43rd Street. The Project adds capacity to both I–405 and SR 167; improves the SR 181 and SR 169 interchanges; reconstructs the SR 167 interchange consisting of general-purpose direct-connector ramp from southbound I–405 to southbound SR 167, HOV direct-connector ramps from northbound SR 167 to northbound I–405 and from southbound I–405 to southbound SR 167, and a split-diamond interchange at Lind Avenue and Talbot Road with connecting frontage roads. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the April 2008 Environmental Assessment (EA) and Draft Section 4(f) Evaluation and in the July 18, 2008 Finding of No Significant Impact (FONSI) and Final Section 4(f) Evaluation, and in other documents in the FHWA administrative record. The EA, FONSI and other documents in the FHWA administrative record are available by contacting FHWA or WSDOT at the addresses provided above. The EA can be viewed and downloaded from the project Web site at *http://www.wsdot.wa.gov/Projects/i405/corridor/tripea.htm* or viewed at public libraries in the project area. Since federal funding is not currently available for this project, an FHWA project number has not been established.

This notice applies to all Federal agency decisions on the project as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].
2. *Air:* Clean Air Act, as amended [42 U.S.C. 7401–7671(q)].
3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].
4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544]; Anadromous

Fish Conservation Act [16 U.S.C. 757(a)–757(g)]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended [16 U.S.C. 1801 *et seq.*].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archaeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archaeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act [7 U.S.C. 4201–4209]; the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended [42 U.S.C. 61].

7. *Wetlands and Water Resources:* Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319); Coastal Zone Management Act [16 U.S.C. 1451–1465]; Land and Water Conservation Fund [16 U.S.C. 4601–4604]; Safe Drinking Water Act [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986 [PL 99–499]; Resource Conservation and Recovery Act [42 U.S.C. 6901–6992(k)].

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Authority: 23 U.S.C. 139(l)(1).

Issued on: July 24, 2008.

Stephen P. Boch,

Major Projects Oversight Manager, Seattle, Washington.

[FR Doc. E8–17427 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2008–0078]

Commercial Driver's License (CDL) Standards; Rotel North American Tours, LLC; Exemption Application

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to grant Rotel North American Tours, LLC (Rotel), an exemption to enable 22 drivers with German commercial driver's licenses (CDLs) to operate 11 commercial motor vehicles (CMVs) in the U.S. without a CDL issued by one of the States. Rotel conducts tours of the U.S. on a seasonal basis for Europeans. It uses motor coaches that are equipped with onboard sleeping and eating facilities. The drivers, in addition to operating the CMVs, provide oral commentary in German. Rotel previously was able to conduct these operations without exemption because its drivers were able to obtain (and renew) non-resident CDLs from certain States. However, there are currently no States willing to issue non-resident CDLs. Rotel states that it must obtain this exemption or end its specialty tour operations.

DATES: This exemption is effective from July 30, 2008 through July 30, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Robert F. Schultz, Jr., FMCSA Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations. Telephone: 202–366–2718. E-mail: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31315 and 31136(e), FMCSA may grant an exemption from the CDL requirements in 49 CFR 383.23 for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level of safety that would be achieved absent such exemption'' (49 CFR 381.305(a)).

Request for Exemption

Rotel, headquartered in Terre Haute, Indiana, conducts bus tours of the United States, Canada, and Mexico for Europeans from the end of March through the middle of October each year. It currently has 22 bus drivers and 11 customized buses dedicated to these operations. Rotel states that it offers a unique touring experience in that each of its buses is equipped with a galley that allows Rotel to offer dining with European cuisine. In addition, each bus is equipped with sleeping accommodations for the passengers.

Rotel drivers operate the buses and deliver oral commentary in German during the tour. The Rotel buses are CMVs as that term is defined in 49 CFR 383.5. Therefore, the operators of the buses must possess a valid U.S. CDL (49 CFR 383.23). Until recently, German drivers could obtain a non-resident CDL in most States. However, Rotel reports that because of heightened security concerns across the U.S., no State currently issues non-resident CDLs. Rotel requests that FMCSA exempt its 22 bus drivers from the requirement that they possess a CDL issued by a State, so that the drivers may operate these 11 buses without a U.S. CDL on a seasonal basis for a period of 2 years.

Rotel's drivers are residents and citizens of Germany. They hold German CDLs, but the German CDL is not recognized in the U.S. Rotel prefers to use native German drivers to conduct the tours. Rotel experimented with using other drivers, but found that the quality of its service was affected adversely.

A complete list of the names and addresses of the drivers is included in the docket of this matter. Rotel believes these drivers possess sufficient knowledge, skills, and experience to ensure a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the requirement for a U.S. CDL. A copy of Rotel's application for exemption is available for review in the docket for this notice.

Comments

On March 20, 2008, FMCSA published notice of this application, and asked for public comment (73 FR 15044). Two comments were received to the public docket. Ms. Deb Carlson of the Department of Public Safety for the State of Minnesota supported the application by pointing out that Germany has ''an extensive driver education requirement'' and that ''there should not be any concerns'' in terms of safety if these drivers were allowed to operate in the U.S. The American Bus Association (ABA) opposed the application, citing safety information about Rotel that it located on public FMCSA Web sites. ABA expressed concern about Rotel's safety performance with regard to drivers, CMVs, and overall safety management. The Agency has examined the safety record of Rotel closely in each of these areas, and concludes that, while Rotel's safety record may reflect certain regulatory compliance issues, the information does not relate to driver licensing and their employees' qualifications to operate large passenger-carrying vehicles. The record reflects that Rotel is responsive in correcting safety deficiencies brought to its attention and that, as a result of an onsite compliance review conducted by FMCSA in 2007, Rotel currently has a ''satisfactory'' safety rating, as defined in 49 CFR part 385.

FMCSA Decision

The FMCSA has evaluated Rotel's application and the public comments on their merits. The Agency believes that Rotel's overall safety performance as reflected in its ''satisfactory'' rating, as well as the knowledge and skills possessed by these drivers as a result of the training program to which all German CDL applicants are exposed, ensure that each of these 22 drivers will likely achieve a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption (49 CFR 381.305(a)). The Agency hereby grants the exemption for a two-year period, beginning July 30, 2008 and ending July 30, 2010 for the following Rotel drivers: Josef Dangl, Reinfried Dangl, Herbert Erber, Helmut Erbersdobler, Wilhelm Fuchs, Ludwig Gerlsberger, Christian Hafner, Peter Hess, Michael Huber, Gerhard Kinateder, Hermann Lichtenauer, Franz Manzinger, Fabian Maurer, Jens Radloff, Rudolf Ramsl, Paul Schlögl, Walter Schreiner, Josef Stockinger, Josef Vogl, Klaus Weber, Markus Wölfl, and Norbert Zechmeister.

Interested parties possessing information that would demonstrate that any or all of these drivers are not achieving the requisite statutory level of safety should immediately notify FMCSA. The Agency will evaluate any such information and, if safety is being compromised or if the continuation of the exemption is not consistent with 49 U.S.C. 31315(b)(4) and 31136(e), will take immediate steps to revoke the exemption of the driver(s) in question, as well as Rotel's exemption, if warranted.

Issued on: July 23, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–17393 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Limitation on Claims Against Proposed Public Transportation Projects

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Limitation on Claims.

SUMMARY: This notice announces final environmental actions taken by the Federal Transit Administration (FTA) for public transportation projects in the following areas: Houston, Texas, Portland, Oregon, and Orlando, Florida. The purpose of this notice is to announce publicly the environmental decisions by FTA on the subject projects and to activate the limitation on any claims that may challenge these final environmental actions.

DATES: By this notice, FTA is advising the public of final agency actions subject to Title 23, United States Code (U.S.C.), section 139(l). A claim seeking judicial review of the FTA actions announced herein for the listed public transportation projects will be barred unless the claim is filed on or before January 26, 2009.

FOR FURTHER INFORMATION CONTACT: Elizabeth Zelasko, Environmental Protection Specialist, Office of Planning and Environment, 202–366–0244, or Christopher Van Wyk, Attorney-Advisor, Office of Chief Counsel, 202–366–1733. FTA is located at 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FTA has taken final agency actions by issuing certain approvals for the public transportation projects listed below. The actions on these projects, as well as the laws under which such actions were taken, are described in the documentation issued in connection with the project to comply with the National Environmental Policy Act (NEPA), and in other documents in the FTA administrative record for the project. The final agency environmental decision documents—Records of Decision (ROD) or Findings of No Significant Impact (FONSI)—for the listed projects are available online at *http://www.fta.dot.gov/planning/environment/planning_environment_documents.html* or may be obtained by contacting the FTA Regional Office for the metropolitan area where the project is located. Contact information for the FTA Regional Offices may be found at *http://www.fta.dot.gov.*

This notice applies to all FTA decisions on the listed projects as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to, the National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4375], Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303], Section 106 of the National Historic Preservation Act [16 U.S.C. 470f], and the Clean Air Act [42 U.S.C. 7401–7671q]. This notice does not, however, alter or extend the limitation period of 180 days for challenges of project decisions subject to previous notices published in the **Federal Register** (e.g., this notice does not extend the limitation on claims announced in the **Federal Register** on November 2, 2007 for the original FONSI issued for the Central Florida Commuter Rail Transit Project).

The projects and actions that are the subject of this notice are:

1. *Project name and location:* North Corridor Fixed Guideway Transit Project, Houston, Texas. *Project sponsor:* Metropolitan Transit Authority of Harris County Texas (METRO). *Project description:* The FTA and METRO have completed a Supplemental Final Environmental Impact Statement (SFEIS) for the North Corridor Fixed Guideway Transit Project (North Corridor Project). The North Corridor Project will extend the existing METRORail Red line from the University of Houston-Downtown Station approximately 5.3 miles north to Northline Mall. The project includes construction of eight passenger stations and five electrical substations; improvements to the existing light rail transit storage and maintenance facility; and the purchase of 12 additional light rail transit vehicles. *Final Agency Actions:* ROD signed on July 1, 2008. Section 106 Memorandum of Agreement signed on June 4, 2008; Project-level Air Conformity determination; and Section 4(f) finding. *Supporting documentation:* North Corridor Fixed Guideway Supplemental Final Environmental Impact Statement (SFEIS) signed on April 18, 2008.

2. *Project name and location:* Southeast Corridor Fixed Guideway Transit Project, Houston, Texas. *Project sponsor:* METRO. *Project description:*

The FTA and METRO have completed a SFEIS for the Southeast Corridor Fixed Guideway Transit Project (Southeast Corridor Project). The Southeast Corridor Project will start in downtown Houston; connect to the universities area including Texas Southern University, University of Houston, and the Palm Center; and end at a terminus on Griggs Road and Beekman Road. The light rail will operate in portions of the alignment on both restricted street lanes and an exclusive bi-directional trackway. For the Southeast Corridor Project, METRO will also construct a vehicle storage facility, ten passenger stations, and a traction power electrical system. *Final agency actions:* ROD signed on July 16, 2008; Section 4(f) de minimis impact finding; Section 106 Memorandum of Agreement signed on June 4, 2008; Project-level Air Conformity determination. *Supporting documentation:* Southeast Corridor Fixed Guideway Supplemental Final Environmental Impact Statement (SFEIS) signed on April 25, 2008.

3. *Project name and location:* Portland Streetcar Loop Project, Portland Oregon. *Project sponsor:* Tri-County Metropolitan Transportation District (TriMet). *Project description:* The project involves the construction of 3.3 miles of double track rail lines in existing streets and public rights-of-way from NW 10th Avenue and Lovejoy Street in the Pearl District of northwest Portland to the Oregon Museum of Science and Industry in southeast Portland. TriMet plans to construct 18 new station pairs with designs similar to those along the existing Portland Streetcar alignment. The project also includes the purchase of 10 streetcars, expansion of the existing streetcar operations and maintenance facility, roadway improvements, and elimination of some bus line service. *Final agency actions:* FONSI signed on July 2, 2008; Section 106 Finding of No Adverse Effect; Project-level Air Conformity determination; Section 4(f) de minimis impact finding. *Supporting documentation:* Environmental Assessment on the Portland Streetcar Loop Project issued on February 8, 2008.

4. *Project name and location:* Central Florida Commuter Rail Transit Project, Orlando, Florida. *Project sponsor:* Florida Department of Transportation (FDOT). *Project description:* FDOT is proposing to operate a commuter rail project on approximately 61 miles of existing freight rail tracks that traverse Orange, Seminole, Volusia, and Osceola counties in the greater metropolitan area of Orlando, Florida. The project will involve the construction of 17 stations and a new vehicle storage and maintenance facility. On April 27, 2007, FTA issued a FONSI on the Central Florida Commuter Rail Transit (CFCRT) North/South Corridor project stating that the project would not have a significant impact on the environment. Since issuing the FONSI, FDOT made several changes to stations on the CFCRT project and these changes were reviewed in a Supplemental EA approved on May 8, 2008. The final agency actions announced in this notice only concern these project changes which are of limited scope and do not warrant reconsideration of the entire project. *Final agency actions:* FONSI signed on July 22, 2008; Section 106 Finding of No Effect on Historic Properties dated June 20, 2008; Section 4(f) finding. *Supporting documentation:* Supplemental Environmental Assessment on the Central Florida Commuter Rail Transit North/South Corridor Project approved on May 8, 2008.

Issued on: July 24, 2008.

Susan Borinsky,

Associate Administrator for Planning and Environment, Washington, DC.

[FR Doc. E8–17482 Filed 7–29–08; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 670 (Sub–No. 1)]

Notice of Rail Energy Transportation Advisory Committee Meeting

AGENCY: Surface Transportation Board.

ACTION: Notice of Rail Energy Transportation Advisory Committee meeting.

SUMMARY: Notice is hereby given of a meeting of the Rail Energy Transportation Advisory Committee (RETAC), pursuant to section 10(a)(2) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C., App. 2).

DATES: The meeting will be held on Wednesday, September 17, 2008, beginning at 9 a.m.

ADDRESSES: The meeting will be held in the Surface Transportation Board's hearing room on the 1st floor of the agency's headquarters at Patriot's Plaza, 395 E Street, SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman at 202–245–0202. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877–8339].

SUPPLEMENTARY INFORMATION: RETAC arose from a proceeding instituted by the Board, in *Establishment of a Rail Energy Transportation Advisory Committee*, STB Ex Parte No. 670. RETAC was formed to provide advice and guidance to the Board, and to serve as a forum for discussion of emerging issues regarding the transportation by rail of energy resources, particularly, but not necessarily limited to, coal, ethanol, and other biofuels. The purpose of this meeting is to continue discussions regarding issues such as rail performance, capacity constraints, infrastructure planning and development, and effective coordination among suppliers, carriers, and users of energy resources.

The meeting, which is open to the public, will be conducted pursuant to RETAC's charter and Board procedures. Further communications about this meeting may be announced through the Board's Web site at *http://www.stb.gov*.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. 721, 49 U.S.C. 11101; 49 U.S.C. 11121.

Decided: July 24, 2008.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–17375 Filed 7–29–08; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Second Draft Report of the Advisory Committee on the Auditing Profession

AGENCY: Office of the Undersecretary for Domestic Finance, Treasury.

ACTION: Notice; request for comments.

SUMMARY: The Advisory Committee on the Auditing Profession is publishing a Second Draft Report and soliciting public comment.

DATES: Comments should be received on or before August 26, 2008.

ADDRESSES: Comments may be submitted to the Advisory Committee by any of the following methods:

Electronic Comments

- Use the Department's Internet submission form (*http://www.treas.gov/offices/domestic-finance/acap/comments*); or

Paper Comments

- Send paper comments in triplicate to Advisory Committee on the Auditing Profession, Office of Financial Institutions Policy, Room 1418, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

In general, the Department will post all comments on its Web site (*http://www.treas.gov/offices/domestic-finance/acap/comments*) without change, including any business or personal information provided such as names, addresses, e-mail addresses, or telephone numbers. The Department will also make such comments available for public inspection and copying in the Department's Library, Room 1428, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect comments by telephoning (202) 622–0990. All comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Kristen E. Jaconi, Senior Policy Advisor to the Under Secretary for Domestic Finance, Department of the Treasury, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, at (202) 927–6618.

SUPPLEMENTARY INFORMATION: At the request of the two Co-Chairs of the Department of the Treasury's Advisory Committee on the Auditing Profession, the Department is publishing this notice soliciting public comment on the Advisory Committee's Second Draft Report. The text of the Second Draft Report is found in the appendix to this notice and may be found on the Web page of the Advisory Committee at *http://www.treas.gov/offices/domestic-finance/acap/index.shtml.* The appendices to the Second Draft Report are not included in this notice, but may be found on the Web page of the Advisory Committee at *http://www.treas.gov/offices/domestic-finance/acap/index.shtml.* The Second Draft Report contains the Advisory Committee's developed proposals on improving the sustainability of a strong and vibrant public company auditing profession. All interested parties are invited to submit their comments in the manner described above.

Dated: July 25, 2008.

Taiya Smith,

Executive Secretary.

Appendix: Advisory Committee on the Auditing Profession

Second Draft Report—July 22, 2008

The Department of the Treasury

Second Draft Report of the Advisory Committee on the Auditing Profession to the U.S. Department of the Treasury

Table of Contents

Transmittal Letter

I. Advisory Committee on the Auditing Profession

[September 2008]

The Honorable Hank M. Paulson, Jr., Secretary,
U.S. Department of the Treasury,
1500 Pennsylvania Avenue, NW.,
Washington, DC 20220.

Dear Secretary Paulson:

On behalf of the Department's Advisory Committee on the Auditing Profession, we are pleased to submit our Final Report.

[Contents of letter to be included in Final Report]

Respectfully Submitted on behalf of the Committee,

Arthur Levitt, Jr.
Committee Co-Chair

Donald T. Nicolaisen
Committee Co-Chair
Enclosure

CHAPTER I: COMMITTEE HISTORY

On November 20, 2006, the Secretary of the Treasury, Henry M. Paulson, Jr., delivered a speech on the competitiveness of the U.S. capital markets, highlighting the need for a sustainable auditing profession.[1] In March 2007, Secretary Paulson hosted a conference at Georgetown University with investors, current and former policymakers, and market participants to discuss issues impacting the competitiveness of the U.S. capital markets, including the sustainability of the auditing profession.[2]

On May 17, 2007, Secretary Paulson announced the Department of the Treasury's (the ''Department's'') intent to establish the Advisory Committee on the Auditing Profession (the ''Committee'') to consider and develop recommendations relating to the sustainability of the auditing profession.[3] At the same time, Secretary Paulson announced that he had asked Arthur Levitt, Jr. and Donald T. Nicolaisen to serve as Co-Chairs of the Committee. The Department published the official notice of establishment and requested nominations for membership on the Committee in the **Federal Register** on June 18, 2007.[4] Secretary Paulson announced the Committee's membership on October 2, 2007, with members drawn from a wide range of professions, backgrounds, and experiences.[5] The Department filed the

[1] Treasury Secretary Henry M. Paulson, Jr., Remarks on the Competitiveness of U.S. Capital Markets at the Economic Club of New York (Nov. 20, 2006), in Press Release No. HP–174, U.S. Dep't of Treas. (Nov. 20, 2006) (included as Appendix C).

[2] Treasury Secretary Henry M. Paulson, Jr., Opening Remarks at Treasury's Capital Markets Competitiveness Conference at Georgetown University (Mar. 13, 2007), in Press Release No. HP–306, U.S. Dep't of Treas. (Mar. 13, 2007) (included as Appendix D).

[3] Press Release, U.S. Dep't of Treas., Paulson Announces First Stage of Capital Markets Action Plan (May 17, 2007) (included as Appendix E); Press Release, U.S. Dep't of Treas., Paulson: Financial Reporting Vital to U.S. Market Integrity, Strong Economy (May 17, 2008) (included as Appendix F).

[4] Notice of Intent to Establish; Request for Nominations, 72 FR 33560 (U.S. Dep't of Treas. June 18, 2007) (included as Appendix A).

[5] Press Release, U.S. Dep't of Treas., Paulson Announces Auditing Committee Members to Make

Committee's Charter with the Senate Committee on Banking, Housing, and Urban Affairs, the Senate Committee on Finance, the House Committee on Financial Services, and the House Committee on Ways and Means on July 3, 2007.[6]

Committee Activities

The Committee held its initial meeting on October 15, 2007 in Washington, D.C.[7] Then Under Secretary for Domestic Finance Robert K. Steel welcomed the Committee members and provided introductory remarks.[8] Also on October 15, 2007, the Committee adopted its by-laws [9] and considered a Working Discussion Outline to be published for public comment.[10] The Working Discussion Outline identified in general terms issues for the Committee's consideration. A Working Bibliography, updated intermittently throughout the course of the Committee's deliberations, provided the members with articles, reports, studies, and other written materials relating to the auditing profession.[11] All full Committee meetings were open to the public and conducted in accordance with the requirements of the Federal Advisory Committee Act.[12] The meetings of the full Committee were also Web or audio cast over the Internet.

The Committee held its second meeting on December 3, 2007 in Washington, DC. The agenda for this meeting consisted of hearing oral statements from witnesses and considering written submissions that those witnesses had filed with the Committee. The oral statements and written submissions focused on the issues impacting the sustainability of the auditing profession, including issues mentioned in the Working Discussion Outline. Nineteen witnesses testified at this meeting.[13] The Committee held a subsequent meeting on February 4, 2008 in Los Angeles, California at the University of Southern California. The agenda for this meeting consisted of hearing oral statements from witnesses and considering written submissions that those witnesses had filed with the Committee. The oral statements and written submissions focused on the issues impacting the sustainability of the auditing profession, including issues mentioned in the Working Discussion Outline. Seventeen witnesses testified at this meeting.[14] The Committee held additional meetings on March 13, 2008, April 1, 2008, May 5, 2008, June 3, 2008, and [____]. All were face-to-face meetings held at the Department in Washington, DC, except for February 4, 2008, which was held in Los Angeles, California, and the meetings on April 1, 2008, and [____], which were telephonic meetings. No witnesses testified at these additional meetings, expect for the June 3, 2008 meeting. The agenda for the June 3, 2008 meeting consisted of hearing oral statements from witnesses and considering written submissions that those witnesses had filed with the Committee. The oral statements and written submissions focused on the issues mentioned in the Draft Report and Draft Report Addendum. Twenty-one witnesses testified at this meeting.[15]

The Committee, through the Department, published [____] releases in the **Federal Register** formally seeking public comment on issues under consideration. On October 31, 2007, the Committee published a release seeking comment on the Working Discussion Outline,[16] in response to which the Committee received seventeen comment letters. On May 15, 2008 and on June 12, 2008, the Committee published releases seeking comment on the Draft Report [17] and Draft Report Addendum,[18] respectively, in response to which the Committee received [____] comment letters. In addition, the Department announced each meeting of the Committee in the **Federal Register**, and in each announcement notice included an invitation to submit written statements to be considered in connection with the meeting.[19] In response to these meeting notices, the Committee received [____] written submissions. In total, the Committee received [____] written submissions in response to **Federal Register** releases.[20] All of the submissions made to the Committee will be archived and available to the public through the Department's Library.

In addition to work carried out by the full Committee, fact finding and deliberations also took place within three Subcommittees appointed by the Co-Chairs. The Subcommittees were organized according to their principal areas of focus: Human Capital, Firm Structure and Finances, and Concentration and Competition.[21] Each of the Subcommittees prepared recommendations for consideration by the full Committee.

III. Background

[Contents of Background to be included in subsequent drafts of this Report.]

IV. Human Capital

The Committee devoted considerable time and effort surveying the human capital issues impacting the auditing profession, including education, licensing, recruitment, retention, and training of accounting and auditing professionals. The charter of the Committee charged its members with developing recommendations relating to the sustainability of the public company

Recommendations for a More Sustainable, Transparent Industry (Oct. 2, 2007) (included as Appendix G). This press release describes the diverse backgrounds of the Committee members. For a list of Members, Observers, and Staff, see Appendix K.

[6] See Committee Charter (included as Appendix B).

[7] The Record of Proceedings of this and subsequent meetings of the Committee are available on the Department's Web site at *http://www.treas.gov/offices/domestic-finance//acap/press.shtml.* See Record of Proceedings, Meeting of the Committee (Oct. 15, 2007, Dec. 3, 2007, Feb. 4, 2008, Mar. 13, 2008, Apr. 1, 2008, May 5, 2008, June 3, 2008, and [____]) [hereinafter Record of Proceedings (with appropriate date)] (on file in the Department's Library, Room 1428), available at *http://www.treas.gov/offices/domestic-finance/acap/press.shtml.*

[8] Under Secretary for Domestic Finance Robert K. Steel, Welcome and Introductory Remarks Before the Initial Meeting of the Treasury Department's Advisory Committee on the Auditing Profession (Oct. 15, 2007), in Press Release No. HP–610, U.S. Dep't of Treas. (Oct. 15, 2007) (included as Appendix H).

[9] The Committee By-Laws are included as Appendix I.

[10] The Working Discussion Outline is included as Appendix L.

[11] The Working Bibliography is included as Appendix M. The Working Bibliography was subsequently updated in December 2007, February 2008, and July 2008.

[12] 5 U.S.C.____App. 2 *et seq.*

[13] Appendix J contains a list of witnesses who testified before the Committee.

[14] Appendix J contains a list of witnesses who testified before the Committee.

[15] Appendix J contains a list of witnesses who testified before the Committee.

[16] Request for Comments, 72 FR 61709 (U.S. Dep't of Treas. Oct. 31, 2007).

[17] Request for Comments, 73 FR 28190 (U.S. Dep't of Treas. May 15, 2008).

[18] Request for Comments, 73 FR 33487 (U.S. Dep't of Treas. June 12, 2008).

[19] Notice of Meeting, 72 FR 55272 (U.S. Dep't of Treas. Sept. 28, 2007); Notice of Meeting, 72 FR 64283 (U.S. Dep't of Treas. Nov. 15, 2007); Notice of Meeting, 73 FR 2981 (U.S. Dep't of Treas. Jan. 16, 2008); Notice of Meeting, 73 FR 10511 (U.S. Dep't of Treas. Feb. 27, 2008); Notice of Meeting, 73 FR 13070 (U.S. Dep't of Treas. Mar. 11, 2008); Notice of Meeting, 73 FR 21016 (U.S. Dep't of Treas. Apr. 17, 2008); Notice of Meeting, FR 28208 (U.S. Dep't of Treas. May 15, 2008); Notice of Meeting, FR 39088 (U.S. Dep't of Treas. July 8, 2008).

[20] All of the written submissions made to the Committee are available in the Department's Library, Room 1428 and on the Department's Committee's Web page at *http://www.treas.gov/offices/domestic-finance/acap/press.shtml.* To avoid duplicative material in footnotes, citations to the written submissions made to the Committee in this Final Report do not reference the Department's Library, Room 1428 or repeat the file number.

[21] For a list of members and their Subcommittee assignments, see Appendix K.

auditing profession. Likewise, the Committee directs the following recommendations and related commentary to those practicing public company auditing. However, the Committee recognizes that several of its recommendations regarding human capital matters would have impact beyond the public company auditing profession, impacting the accounting profession as a whole. The Committee views the accelerating pace of change in the global corporate environment and capital markets and the increasing complexity of business transactions and financial reporting as among the most significant challenges facing the profession as well as financial statement issuers and investors. These are directly impacted by human capital issues. To ensure its viability and resilience and its ability to meet the needs of investors, the public company auditing profession needs to continue to attract and develop professionals at all levels who are prepared to perform high quality audits in this dynamic environment. It is essential that these professionals continue to be educated and trained to review, judge, and question all accounting and auditing matters with skepticism and a critical perspective. The recommendations presented below reflect these needs.

After receiving testimony from witnesses and from comment letters, the Committee identified specific areas where the Committee believed it could develop recommendations to be implemented in the relatively short term to enhance the sustainability of the auditing profession. These specific areas include accounting curricula, accounting faculty, minority representation and retention, and development and maintenance of human capital data. The Committee has also developed a recommendation to study the possible future of higher accounting education's institutional structure.

The Committee recommends that regulators, the auditing profession, educators, educational institutions, accrediting agencies, and other bodies, as applicable, effectuate the following:

Recommendation 1. Implement market-driven, dynamic curricula and content for accounting students that continuously evolve to meet the needs of the auditing profession and help prepare new entrants to the profession to perform high quality audits.

The Committee considered the views of all witnesses who provided input regarding accounting curricula at educational institutions.[22] The Committee believes that the accounting curricula in higher education are critical to ensuring that individuals have the necessary knowledge, mindset, skills, and abilities to perform quality public company audits. In order to graduate from an educational institution with an accounting degree, students must have completed a certain number of hours in accounting and business courses. Accounting curricula typically include courses in auditing, financial accounting, cost accounting, and U.S. federal income taxation. Business curricula typically include courses in ethics, information systems and controls, finance, economics, management, marketing, oral and written communication, statistics, and U.S. business law.[23] Since the 1950s, several private sector groups have studied and recommended changes to the accounting curricula,[24] but notwithstanding these pleas for reform, curricula are characteristically slow to change.[25]

In this regard, the Committee makes the following recommendations:

(a) Regularly update the accounting certification examinations to reflect changes in the accounting profession, its relevant professional and ethical standards, and the skills and knowledge required to serve increasingly global capital markets.

Accounting and auditing professionals commonly complete the requirements of professional examinations in order to comply with legal or professional association requirements. To become licensed at the state level as a certified public

[22] See, *e.g.*, Record of Proceedings (Dec. 3, 2007) (Written Submission of Joseph V. Carcello, Director of Research, Corporate Governance, University of Tennessee, Knoxville, 8), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Carcello120307.pdf* (noting the market's expectations that university accounting curricula will expose students to recent financial reporting developments, such as international financial reporting standards and eXtensible Business Reporting Language); Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia Fornelli, Executive Director, Center for Audit Quality, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf* (stating the need to ''[d]edicate funds and people to work with accounting professors to ensure that the curriculum is keeping pace with developments in business transactions, international economics and financial reporting'' and specifying the need to focus on ethical standards and international accounting and auditing standards); Record of Proceedings (Dec. 3, 2007) (Written Submission of Dennis Nally, Chairman and Senior Partner, PricewaterhouseCoopers LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Nally120307.pdf* (stating the need to ''[m]odernize and enhance the university accounting curriculum, which should include consideration of other global curriculum models to increase knowledge of International Financial Reporting Standards (IFRS), finance and economics, and process controls'').

[23] Record of Proceedings (Feb. 4, 2008) (Written Submission of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 13), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Reckers020408.pdf* (commenting that business students typically take two sophomore-level introductory accounting classes and accounting majors take six additional accounting courses in their final two years of schooling).

[24] See e.g., Franklin Pierson, et al., The Education of American Businessmen (1959) (noting that the main goal of a business education should be the development of an individual with broad training in both the humanities and principles of business); Robert A. Gordon and James E. Howell, Higher Education for Business (1959) (suggesting that accounting curriculum abandon its emphasis on financial accounting and auditing while emphasizing humanities); Robert H. Roy and James H. MacNeill, Horizons for a Profession (1967) (emphasizing the importance of a humanities background for accountants and recommending accounting graduate study); American Institute of Certified Public Accountants, Committee on Education and Experience Requirements for CPAs, Report of the Committee on Education and Experience Requirements for CPAs (Mar. 1969) (recommending, among other things, a five-year education requirement to be adopted by states by 1975); American Institute of Certified Public Accountants, Education Requirements for Entry into the Accounting Profession: A Statement of AICPA Policies (May 1978) (preferring a 150 semester-hour education requirement rather than a five-year education requirement to acquire the common body of knowledge and sit for the CPA examination); American Accounting Association, Committee on the Future Structure, Content, and Scope of Accounting Education, Future Accounting Education: Preparing for the Expanding Profession, 1 Issues in Accounting Education, No. 1, 168–95 (Spring 1986) (examining accounting education and accounting practice since 1925 and concluding that, among other things, the current state of accounting education is inadequate to meet the dynamic needs of the profession and accounting education must be reassessed to meet these needs); American Institute of Certified Public Accountants, Education Requirements for Entry into the Accounting Profession: A Statement of AICPA Policies, 2nd Ed., Revised (Feb. 1988) (reaffirming the 150 semester-hour requirement); Arthur Andersen & Co., Arthur Young, Coopers & Lybrand, Deloitte Haskins & Sells, Ernst & Whinney, Peat Marwick Main & Co., Price Waterhouse, and Touche Ross, Perspectives on Education: Capabilities for Success in the Accounting Profession (1989), available at *http://aaahq.org/aecc/big8/cover.htm* (stating that the chief executive officers of the eight largest public accounting firms believe that graduates entering public accounting need to have greater interpersonal, communication, and thinking skills as well as greater business knowledge and that the accounting curriculum must be a dynamic experience); and Accounting Education Change Commission, Objectives of Education for Accountants: Position Statement Number One, 6 Issues in Accounting Education, No. 2, 307–12 (Fall 1990) (describing the education objectives for accountants in an environment where accounting education has not kept pace with the changing demands upon the accounting profession).

[25] Record of Proceedings (Dec. 3, 2007) (Written Submission of Ira Solomon, R.C. Evans Distinguished Professor, and Head, Department of Accountancy, University of Illinois, 14–15), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Solomon120307.pdf* (lamenting the slow pace of change in accounting curricula and education).

accountant, an individual must, among other things, pass the Uniform CPA Examination. Professional examinations, such as the Uniform CPA Examination, influence the content of the technical, ethical, and professional materials comprising the accounting curricula.[26]

The Committee believes that evolution of professional examination content serves as an important catalyst for curricular changes to reflect the dynamism and complexity of auditing public companies in global capital markets. The American Institute of Certified Public Accountants (AICPA) already regularly analyzes and updates its examination content, through practice content analysis and in conjunction with the AICPA Board of Examiners, which comprises members from the profession and state boards of accountancy. The Committee recommends that such changes remain a focus to ensure that both the 150 semester hour curriculum[27] as well as examination content reflect in a timely manner important ongoing market developments and investor needs, such as the increasing use of international financial reporting standards (IFRS),[28] expanded fair value measurement and reporting, increasingly complex transactions, new Public Company Accounting Oversight Board (PCAOB) auditing and professional standards,[29] risk-based business judgment, and technological innovations in financial reporting.

Moreover, the Committee believes that professional[30] and ethical standards,[31] fraud examination and forensic auditing, financial risk management, and valuation, and subject matter relating to their application, are an essential component of the accounting and auditing curricula and accordingly should be reflected in the professional examinations and throughout business and accounting coursework.[32]

Finally, the Committee recommends that the market developments outlined in this section be reflected in professional examination content as soon as practicable, but not later than 2011.[33] In particular, the CPA examination should test a candidate's knowledge consistent with practice needs and the highest contemporary level of education required based on those practice needs. In addition, the Committee recommends that new evolving examination content be widely and promptly communicated to college and university faculty and administrators so that corresponding curricular changes in educational institutions can continually occur on a timely basis.

(b) Reflect real world changes in the business environment more rapidly in teaching materials.

Students are expected to use a variety of sources, such as textbooks and online materials, to learn. Such materials are an important element of higher education. The Committee learned that these commercial materials are generally conservatively managed and follow rather than lead recent market developments.[34] Because developing accounting materials involves a significant investment of time and resources, commercial content providers carefully consider the potential risks and rewards before publishing new materials, even where a more prompt response to new developments might be beneficial to students.

The Committee believes that accounting educational materials can contribute to inducing curricular changes that reflect the dynamism and complexity of the global capital markets and that commercial content providers should recognize the importance of capturing recent developments in their published materials. Specifically, the Committee recommends that organizations, such as the AICPA and the American Accounting Association (AAA), meet with commercial content providers and encourage them to update their materials promptly to reflect recent developments such as the increasing use

[26] Gary Sundem, The Accounting Education Change Commission: Its History and Impact Chapter 6 (1999), available at http://aaahq.org/AECC/history/index.htm (''[T]he CPA examination has certainly had a major influence on the accounting curriculum and on other aspects of accounting programs.'').

[27] See, *e.g.*, Record of Proceedings (Written Submission of Jean C. Bedard, Timothy B. Harbert Professor of Accounting, Department of Accountancy, Bentley College, 1), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard060308.pdf* (observing that using the CPA Examination as a catalyst for curricula change will only be effective if the CPA Examination is written assuming completion of 150 hours); Record of Proceedings (June 3, 2008) (Questions for the Record of Joseph V. Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP, Professor and Director of Research—Corporate Governance Center, University of Tennessee, Jean C. Bedard, Professor of Accountancy, Bentley College, and Dana R. Hermanson, Chair of Private Enterprise and Professor of Accounting, Kennesaw State University, 2 (June 20, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/QFRs-6–3–08.pdf* (noting that recent developments suggest a trend away from requiring 150 hours to sit for the CPA examination since eighteen states allow candidates to sit for the exam after 120 hours); Edward P. Howard, Senior Counsel, and Julianne D'Angelo Fellmeth, Administrative Director, Center for Public Interest Law, Comment Letter Regarding Draft Report and Draft Report Addendum 2–4 (June 13, 2008), available at *http://comments.treas.gov/_files/ACAP_Draft_Report_Comments.pdf* (providing background on the issue of requiring 150-hours for licensure while allowing 120-hours to sit for the CPA Examination in California); Record of Proceedings (June 3, 2008) (Oral Remarks of Anne M. Mulcahy, Chairman and Chief Executive Officer, Xerox Corporation, and Alan L. Beller, Partner, Cleary Gottlieb Steen & Hamilton LLP, 70–71, 77), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-06–03–08.pdf* (noting the tension between updating the curricula in order to keep current with the changing environment and fitting these changes into a four-year program).

[28] Samuel K. Cotterell, CPA, Chair, NASBA, and David A. Costello, CPA, President and CEO, NASBA, Comment Letter Regarding Draft Report and Draft Report Addendum 1 (June 29, 2008), available at *http://comments.treas.gov/_files/June2908LetterheadTreasuryAdvisoryCommitteeontheAuditingProfession*.pdf (agreeing that IFRS should be reflected in the CPA examination); Arnold C. Hanish, Chair, Committee on Corporate Reporting, Financial Executives International, Comment Letter Regarding Draft Report and Draft Report Addendum 2 (July 3, 2008), available at *http://comments.treas.gov/_files/FEICCRTreasuryACAPCommentLetterFiled73080.pdf* (suggesting a greater emphasis of IFRS in the accounting curriculum).

[29] See *e.g.*, An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements, Auditing Standard No. 5 (Pub. Company Accounting Oversight Bd. 2007).

[30] See PCAOB Standards and Related Rules, available at *http://www.pcaobus.org/Standards/Standards_and_Related_Rules/index.aspx*.

[31] See PCAOB Interim Ethics Standards, available at *http://www.pcaobus.org/Standards/Interim_Standards/Ethics/index.aspx*.

[32] See. *e.g.*, Samuel K. Cotterell, CPA, Chair, NASBA, and David A. Costello, CPA, President and CEO, NASBA, Comment Letter Regarding Draft Report and Draft Report Addendum 1 (June 29, 2008), available at *http://comments.treas.gov/_files/June2908LetterheadTreasuryAdvisoryCommitteeontheAuditingProfession*.pdf (agreeing that ethics should be included in the accounting curriculum); Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 9 (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf* (recommending that the Committee state that the following courses should be included in the curricula: ethics, fraud examination and forensic auditing, problem solving, finance, negotiation and communication skills, financial risk management, global business, taxation, and valuation); Record of Proceedings (Written Submission of Anne M. Lang, Chief Human Resources Officer, Grant Thornton LLP, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Lang060308.pdf* (asking the Committee to specifically cite the need for curricula that teach specialized knowledge, such as risk management, computational finance, valuation theory, and sophisticated modeling techniques).

[33] See, e.g., Samuel K. Cotterell, CPA, Chair, NASBA, and David A. Costello, CPA, President and CEO, NASBA, Comment Letter Regarding Draft Report and Draft Report Addendum 1 (June 29, 2008), available at *http://comments.treas.gov/_files/June2908LetterheadTreasuryAdvisoryCommitteeontheAuditingProfession.pdf* (agreeing with the Recommendation to keep the CPA examination current).

[34] Subcommittee on Human Capital Record of Proceedings (Jan. 16, 2008) (Oral Remarks of Bruce K. Behn, President, Federation of Schools of Accountancy, and Ergen Professor of Business, Department of Accounting and Information Management, University of Tennessee, Knoxville).

of IFRS, new PCAOB auditing and professional standards, risk-based business judgment, and expanded fair value reporting, as well as technological developments in financial reporting and auditing such as eXtensible Business Reporting Language (XBRL).[35]

Further, in order to ensure access to such materials and recognizing the benefits of technological innovations,[36] the Committee recommends that authoritative bodies and agencies should be encouraged to provide low-cost, affordable access to digitized searchable authoritative literature and materials, such as Financial Accounting Standards Board (FASB) codification and eIFRS, to students and faculty members. Moreover, since the content of professional examinations, such as the Uniform CPA Examination, is based upon research using digitized materials, students need to have access to, among other things, searchable accounting standards.[37] The Committee believes that low-cost affordable access to such primary materials would thus enhance student learning and performance and technical research.

(c) Require that schools build into accounting curricula current market developments.

A common theme of our first set of recommendations is that accounting curricula should reflect recent developments, including globalization and evolving market factors. As a further catalyst to curricula development and evolution by educational institutions, the Committee recommends ongoing attention to responsiveness to recent developments by the bodies that accredit educational institutions. Accrediting agencies review institutions of higher education and their programs and establish that overall resources and strategies are conformed to the mission of the institutions. For example, the Association to Advance Collegiate Schools of Business (AACSB) and the Association of Collegiate Business Schools and Programs (ACBSP) accredit business administration and accounting programs. Since 1919, the AACSB has accredited business administration programs and, since 1980, accounting programs offering undergraduate and graduate degrees. The AACSB has accredited over 450 U.S. business programs and over 150 U.S. accounting programs. Since 1988, the ACBSP has accredited business programs offering associate, baccalaureate, and graduate degrees. As of February 2008, over 400 educational institutions have achieved ACBSP accreditation. The accreditation standards at both accrediting agencies relate to, among other things, curricula, program and faculty resources, and faculty development.

The Committee believes that the accreditation process and appropriate accreditation standards can contribute to curricular changes. In particular, accreditation standards that embody curricular requirements to reflect the dynamism and complexity of the global capital markets and that evolve to keep pace in the future can be helpful in maintaining and advancing the quality of accounting curricula. The AACSB has emphasized in its accreditation standards that accounting curricula should reflect recent market developments. For example, educational institutions must include in their curricula international accounting issues in order to receive AACSB accreditation. The Committee supports the accrediting agencies' efforts to continually develop standards specifically emphasizing the need to update accounting programs.

Recommendation 2. Improve the representation and retention of minorities in the auditing profession so as to enrich the pool of human capital in the profession.

The auditing profession presents challenging and rewarding opportunities for those who pursue a career in auditing and the profession actively recruits talent from all backgrounds.[38] Yet, the Committee was concerned by what it heard from individuals with various backgrounds about minority representation and retention in the auditing profession.[39] In

[35] See, e.g., Aram Kostoglian, Eastern Region Attest Practice Leader, and Ernest Baugh, National Director of Professional Standards, Mayer Hoffman McCann P.C., Comment Letter Regarding Draft Report and Draft Report Addendum 1 (June 13, 2008), available at *http://comments.treas.gov/_files/MayerHoffman McCannCommentLetter.pdf* (noting that textbooks lack a thorough discussion of current market developments); PricewaterhouseCoopers LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 4 (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtr TreasCmtDraftandAddendum63008.pdf* (noting support for updating teaching materials promptly to reflect recent developments such as the increasing use of IFRS).

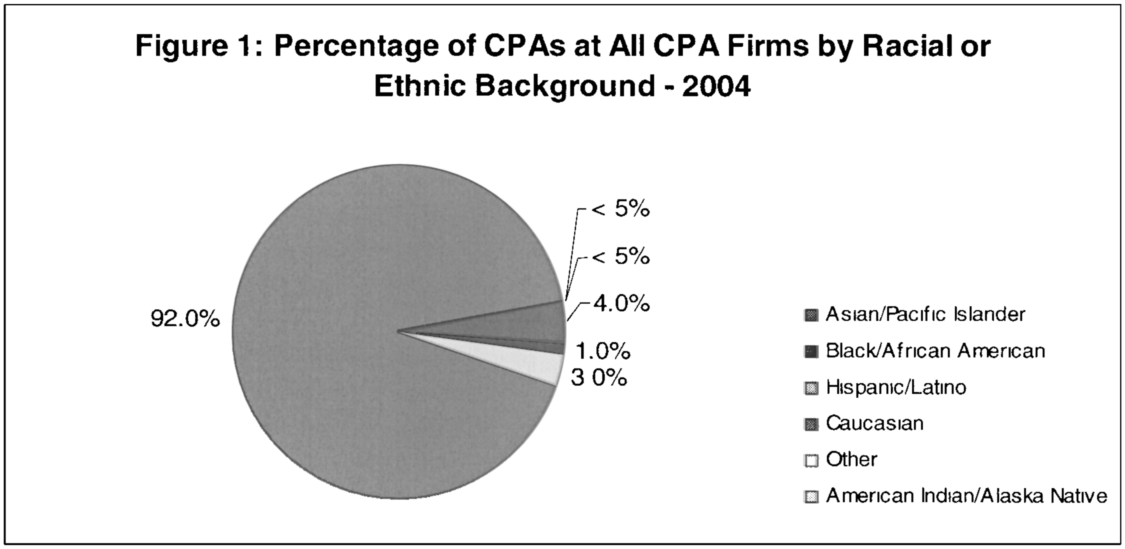
[36] See Stephanie Woodruff, Chief Revenue Officer, AverQ, Inc, Comment Letter Regarding Draft Report and Draft Report Addendum (June 2, 2008), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.ViewPopup&Topic_id=9&FellowType_id=1&Reply_id=95&Suppress Layouts=True* (suggesting the use or study of "technology" to address auditing profession challenges).

[37] See Record of Proceedings (Feb. 4, 2008) (Written Submission of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 14), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Reckers020408.pdf* (affirming the need for student access to digitized searchable accounting and auditing materials).

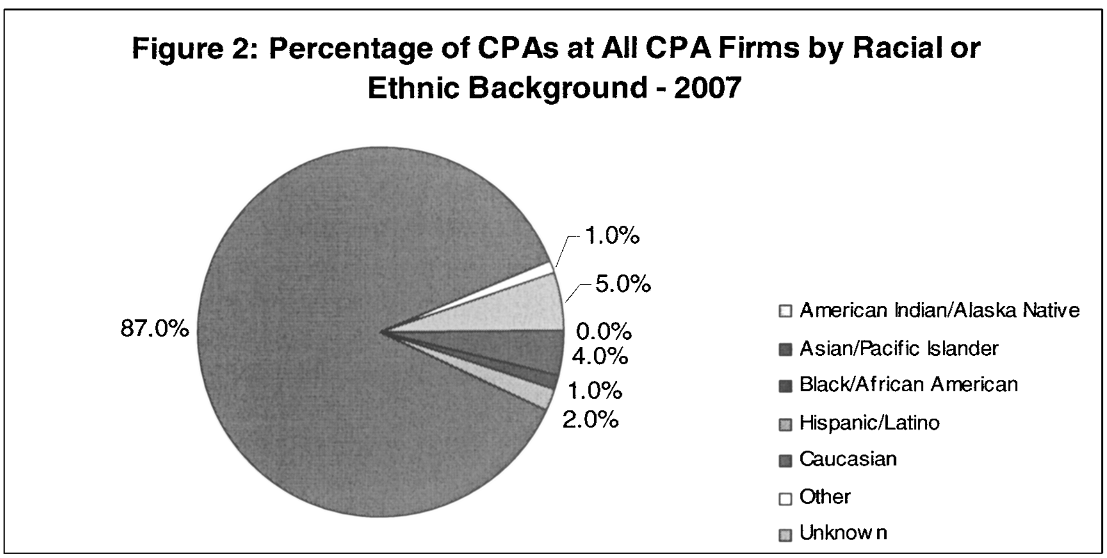
[38] The Committee discussed the issue of representation and retention of females in the profession and the Committee found that the profession is undertaking significant efforts to hire and retain females and notes that these issues are being much better managed today. See, *e.g.,* Record of Proceedings (June 3, 2008) (Oral Remarks of Amy Woods Brinkley, Global Risk Executive, Bank of America Corporation, 57), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-06-03-08.pdf* (noting that the Committee spent considerable time discussing this issue of females in the profession); Record of Proceedings (June 3, 2008) (Written Submission of Kayla J. Gillan, Chief Administrative Officer, RiskMetrics Group, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Gillan060308.pdf* (urging the Committee to examine the issue of females in the profession); Record of Proceedings (June 3, 2008) (Oral Remarks of Anne M. Lang, Chief Human Resources Officer, Grant Thornton LLP, 100–101), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-06-03-08.pdf* (stating that "* * * certainly recruiting women into the profession is something that [Grant Thornton LLP has] done extremely well for the last several years * * * [the] advancement of * * * women is something that [Grant Thornton LLP] still need[s] to pay attention to"). The Committee notes the following statistics: In 2007, at the partner level, females represented 23% of partners on average, while in 2004 they were 19% and in 1994 they were just 12% of all partners. See American Institute of Certified Public Accountants, A Decade of Changes in The Accounting Profession: Workforce Trends and Human Capital Practices 5 (Feb. 2006) and Dennis R. Reigle, Heather L. Bunning And Danielle Grant, 2008 Trends In The Supply of Accounting Graduates And The Demand For Public Accounting Recruits 60 (2008), available at *http://ceae.aicpa.org/NR/rdonlyres/C1E23302-17D3-4ED5-AE81-B274D9CD7812/0/AICPA_Trends_Reports_2008.pdf.* According to Public Accounting Report surveys, the percentage of female professionals at the largest firms was 47.3% in 2007 and 44.2% in 2004. See Women at Big Four Gain Ground in Partnership Percentage, Public Accounting Report 6 (Oct. 31, 2004) and Women Post Gains in Partnership Percentage, Public Accounting Report 11 (Jan. 31, 2008). From 2005 to 2007, women represented about half of the new hires at the six largest firms. See Center For Audit Quality, Report Of The Major Public Company Audit Firms To The Department Of The Treasury Advisory Committee On The Auditing Profession 58 (Jan. 23, 2008). The Committee also considered the effects of workload compression on retention in the profession. Some Committee members believe that audit firms and their clients could benefit from spreading tax preparation work throughout the year. See, e.g., Record of Proceedings (Oct. 15, 2007) (Oral Remarks of William D. Travis, Director and Former Managing Partner, McGladrey & Pullen LLP, 71), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-10-15-07.pdf* (noting that "[a] significant challenge for retention of personnel in mid-size and small audit firms is the extreme seasonality * * * during the winter season. This reality places enormous pressure on audit quality and balanced lives of * * * professionals"); Record of Proceedings (Mar. 13, 2008) (Oral Remarks of Barry C. Melancon, President and Chief Executive Officer, American Institute of Certified Public Accountants, 118), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-03-13-08.pdf* (noting that the Human Capital Subcommittee discussed workload compression issues).

[39] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of Ira Solomon, R.C. Evans

2004, minorities accounted for 22% of all bachelor's and masters' degrees awarded in accounting, while in 2007, minorities accounted for 21%.[40] In 2004, African Americans represented 1% of all CPAs, Hispanic/Latino, 3%, and Asian/Pacific Islander, 4%.[41] See Figure 1. These percentages changed very little in 2007 when African Americans represented 1% of all CPAs, Hispanic/Latino, 2%, and Asian/Pacific Islander, 4%.[42] See Figure 2.



Source: BEATRICE SANDERS, AND LETICIA B. ROMEO, THE SUPPLY OF ACCOUNTING GRADUATES AND THE DEMAND FOR PUBLIC ACCOUNTING RECRUITS-2005: FOR ACADEMIC YEAR 2003-2004 35 (2005).



Source: DENNIS R. REIGLE, HEATHER L. BUNNING AND DANIELLE GRANT, 2008 TRENDS IN THE SUPPLY OF ACCOUNTING GRADUATES AND THE DEMAND FOR PUBLIC ACCOUNTING RECRUITS 61 (2008).

African Americans accounted for 5.4% of new hires in 2007 at the largest

Distinguished Professor, and Head, Department of Accountancy, University of Illinois, 13), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Solomon120307.pdf*; Record of Proceedings (Dec. 3, 2007) (Questions for the Record of George S. Willie, Managing Partner, Bert Smith & Co., 2 (Jan. 30, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Willie120307.pdf*; Record of Proceedings (Dec. 3, 2007) (Written Submission of Julie K. Wood, Chief People Officer, Crowe Chizek and Company LLC, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Wood120307.pdf*.

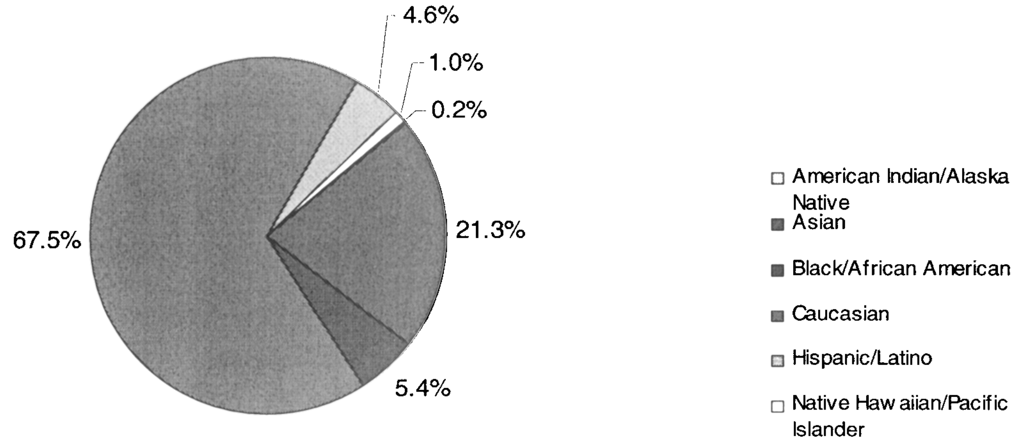
[40] Dennis R. Reigle, Heather L. Bunning And Danielle Grant, 2008 Trends In The Supply Of Accounting Graduates And The Demand For Public Accounting Recruits 30 (2008), available at *http://ceae.aicpa.org/NR/rdonlyres/C1E23302-17D3-4ED5-AE81-B274D9CD7812/0/AICPA_Trends_Reports_2008.pdf*.

[41] Beatrice Sanders, And Leticia B. Romeo, The Supply Of Accounting Graduates And The Demand For Public Accounting Recruits–2005: For Academic Year 2003–2004 35 (2005), available at *http://ceae.aicpa.org/NR/rdonlyres/11715FC6-F0A7-4AD6-8D28-6285CBE77315/0/Supply_DemandReport_2005.pdf*.

[42] Dennis R. Reigle, Heather L. Bunning And Danielle Grant, 2008 Trends In The Supply Of Accounting Graduates And The Demand For Public Accounting Recruits 61 (2008), available at *http://ceae.aicpa.org/NR/rdonlyres/C1E23302-17D3-4ED5-AE81-B274D9CD7812/0/AICPA_Trends_Reports_2008.pdf*.

six accounting firms, Hispanics, 4.6%, and Asians, 21.3%.[43] See Figure 3.

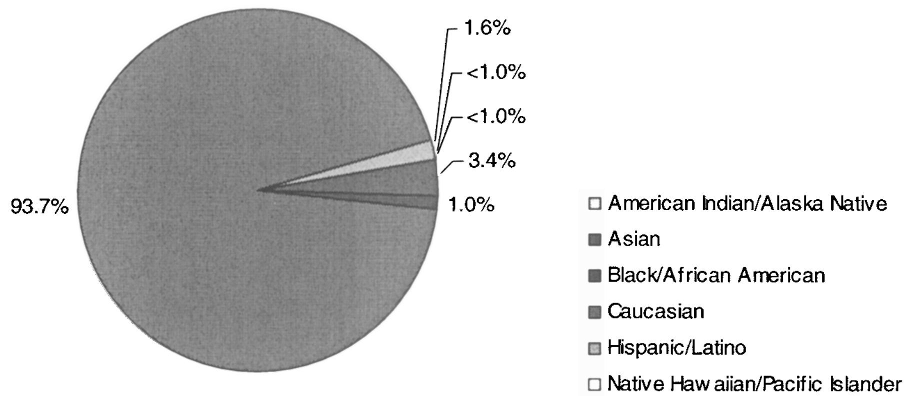
Figure 3: Ethnicity of New Hires at the Largest Auditing Firms - 2007



Source: CENTER FOR AUDIT QUALITY, REPORT OF THE MAJOR PUBLIC COMPANY AUDIT FIRMS TO THE DEPARTMENT OF THE TREASURY ADVISORY COMMITTEE ON THE AUDITING PROFESSION 59 (Jan. 23, 2008).

In 2007, 1.0% of the partners in the six largest accounting firms were African American, 1.6% were Hispanic/Latino, 3.4% were Asian, and less than 1.0% were Native Hawaiian/Pacific Islander or American Indian/Alaska Native, aggregating less than 7% of the total partners.[44] See Figure 4.

Figure 4: Ethnicity of Partners at the Largest Auditing Firms - 2007



Source: CENTER FOR AUDIT QUALITY, REPORT OF THE MAJOR PUBLIC COMPANY AUDIT FIRMS TO THE DEPARTMENT OF THE TREASURY ADVISORY COMMITTEE ON THE AUDITING PROFESSION 60 (Jan. 23, 2008).

The Committee recognizes that important groups within the minority population are significantly under-represented in the accounting and auditing profession, especially at senior levels, and this under-representation of minorities in the profession is unacceptable from both a societal and business perspective. As the demographics of the global economy continue to expand ethnic diversity, it is imperative that the profession also reflect these changes. The auditing profession's historic role in performing audits in an increasingly diverse global setting and in establishing investor trust cannot be maintained unless the profession itself is viewed as open and

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[43] Center For Audit Quality, Report Of The Major Public Company Audit Firms To The Department Of The Treasury Advisory Committee On The Auditing Profession 59 (Jan. 23, 2008), available at *http://www.thecaq.org/publicpolicy/data/TRData2008-01-23-FullReport.pdf.*

[44] Center For Audit Quality, Report Of The Major Public Company Audit Firms To The Department Of The Treasury Advisory Committee On The Auditing Profession 60 (Jan. 23, 2008), available at *http://www.thecaq.org/publicpolicy/data/TRData2008-01-23-FullReport.pdf.*

representative. To ensure the continued health and vibrancy of the profession, it is imperative that all participants in the financial, investor, educator, and auditor community adopt and implement policies, programs, practices, and curricula designed to attract and retain minorities. In order for minority participation in the accounting and auditing profession to grow and sustain itself, minority recruitment and retention needs to be a multi-faceted, multi-year effort, implemented and championed by community leaders, families, and most importantly business and academic leaders who educate, recruit, employ, and rely on accountants and auditors.

In this regard, the Committee recognizes the importance of setting goals and measuring progress against these goals and thus makes the following recommendations:

(a) Recruit minorities into the auditing profession from other disciplines and careers.

The Committee heard from witnesses that the auditing profession has ''fallen short'' on its minority recruitment goals.[45] Accordingly, the Committee recommends that auditing firms actively market to and recruit from minority non-accounting graduate populations, both at the entry and experienced hire level, utilizing cooperative efforts by academics and firm-based training programs to assist in this process.[46] Generally, auditing firms hire individuals for the audit practice who are qualified to sit for the Uniform CPA Examination.[47]

Further, the Committee recommends that auditing firms expand their recruitment initiatives at historically black colleges and universities (HBCUs), and explore the use of proprietary schools as another way to recruit minorities into the profession.[48] Currently over 100 educational institutions established before 1964 to serve the African American community are designated as HBCUs and over fifty of these HBCUs maintain accounting programs. Approximately 290,000 students are enrolled in HBCUs[49] and HBCUs enroll 14% of all African American students in higher education.[50] Twenty-seven HBCUs have one or more of the six largest accounting firms recruiting professional staff on their campus.[51] Both the number of these schools visited by the largest firms and the number of firms recruiting at these schools should increase. Proprietary schools are for-profit businesses that teach vocational or occupational skills and there are over 2,000 proprietary schools in the United States.[52] In 2005, these schools enrolled over 1 million students: African Americans accounted for 23% of these students, Hispanics, 13%, and Asian/Pacific Islander, 4%.[53]

(b) Institute initiatives to increase the retention of minorities in the profession.

The Committee considered testimony on the retention of minorities in the profession.[54] As discussed above, minorities are significantly under-represented in leadership and partnership positions within the profession. The Committee recognizes the lack of minority mentors and role models[55] in the profession and the profession's awareness of this situation.[56] In a 2006 National Association of Black Accountants (NABA) survey, almost 60% of African American respondents stated that their mentors come from outside of the profession and almost 55% of respondents stated that they had been with their current employer for three years or less.[57] The Committee considered testimony that African Americans leave the profession for other careers or do not wish to become managers or partners because they see that there are few African Americans in leadership positions within the firms.[58] The Committee also heard testimony that the retention rate for Hispanics ''is low.''[59] In 2004, Hispanics represented 3% of the professional staff at all CPA

[45] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of Julie K. Wood, Chief People Officer, Crowe Chizek and Company LLC, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Wood120307.pdf*.

[46] See Ernst & Young LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 22 (June 27, 2008), available at *http://comments.treas.gov/_files/EYACAPCommentLetterFINAL2.pdf* (supporting this Recommendation).

[47] See Record of Proceedings (Dec. 3, 2007) (Questions for the Record of James S. Turley, Chairman and Chief Executive Officer, Ernst & Young LLP, 4 (Feb. 1, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/QFRs-12-3-07.pdf* (noting that since 1997, Ernst & Young LLP has typically hired individuals qualified to sit for the Uniform CPA Examination).

[48] Record of Proceedings (June 3, 2008) (Written Submission of Frank K. Ross, Director, Center for Accounting Education, Howard University School of Business, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Ross060308.pdf* (agreeing that this Recommendation will help increase minority recruitment).

[49] Stephen Provasnik and Linda L. Shafer, Historically Black Colleges and Universities, 1976 to 2001 2 (NCES 2004–062), available at *http://nces.ed.gov/pubs2004/2004062.pdf*.

[50] White House Initiative On Historically Black Colleges And Universities, available at *http://www.ed.gov/about/inits/list/whhbcu/edlite-index.html*.

[51] Center For Audit Quality, Supplement To Report Of The Major Public Company Audit Firms To The Department Of The Treasury Advisory Committee On The Auditing Profession 1 (Mar. 5, 2008), available at *http://www.thecaq.org/publicpolicy/data/TRData2008-03-05-Supplement1.pdf*.

[52] Thomas D. Snyder, Sally A. Dillow, And Charlene M. Hoffman, Digest Of Education Statistics 2007 Table 5 (NCES 2008–022), available at *http://nces.ed.gov/pubs2008/2008022.pdf*.

[53] Thomas D. Snyder, Sally A. Dillow, And Charlene M. Hoffman, Digest Of Education Statistics 2007 Table 220 (NCES 2008–022), available at *http://nces.ed.gov/pubs2008/2008022.pdf*.

[54] Record of Proceedings (Dec. 3, 2007) (Written Submission of George S. Willie, Managing Partner, Bert Smith & Co., 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Willie120307.pdf* (noting that ''firms must do more to retain and promote minority professionals''); Record of Proceedings (June 3, 2008) (Written Submission of Frank K. Ross, Director, Center for Accounting Education, Howard University School of Business, 8), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Ross060308.pdf* (noting that ''auditing firms need to establish aggressive retention programs that focus on retention'').

[55] Record of Proceedings (Feb. 4, 2008) (Written Submission of Gilbert R. Vasquez, Managing Partner, Vasquez & Company LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Vasquez02042008.pdf* (highlighting the lack of Hispanic role models and mentors in the accounting profession).

[56] See Record of Proceedings (July 12, 2006) (Written Testimony of Manuel Fernandez, National Managing Partner—Campus Recruiting, KPMG LLP, to the Subcommittee on Oversight and Investigations of the House Financial Services Committee, 5), available at *http://financialservices.house.gov/media/pdf/071206mf.pdf* (identifying the lack of minority faculty mentors and role models and noting ''[w]hen students of color do not see professors of their own ethnic background on the accounting faculty, they are less apt to consider the option of a career in accountancy''); Record of Proceedings (Dec. 3, 2007) (Questions for the Record of George S. Willie, Managing Partner, Bert Smith & Co., 1 (Jan. 30, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Willie120307.pdf* (recommending the establishment of a mentor program for minority accounting students).

[57] The Center for Accounting Education, Howard University School of Business, NABA Membership Survey, Analysis of Work Experience of NABA Members Table 23 and 5 (Sept. 15, 2006), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/NABAMembershipSurvey.pdf*.

[58] Record of Proceedings (June 3, 2008) (Written Submission of Frank K. Ross, Director, Center for Accounting Education, Howard University School of Business, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Ross060308.pdf*.

[59] Record of Proceedings (Feb. 4, 2008) (Written Submission of Gilbert R. Vasquez, Managing Partner, Vasquez & Company LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Vasquez02042008.pdf*.

firms [60] and this percentage did not change in 2007.[61]

The Committee believes that firms must continue to find ways to retain minorities in the profession in order to ensure the profession's long-term viability. The Committee believes the need to instill confidence is critical to an individual's career as is the need for mentors, especially at the start of an individual's career.[62] The Committee also recognizes that auditing firms must continue to give challenging assignments so that individuals have the motivation to stay in the profession.[63] Thus, the Committee recommends that public company auditing firms intensify their efforts to create and maintain retention programs, including mentoring programs, for their employees as a means to provide these individuals with guidance, career coaching, and networking. Further, the Committee recommends that the profession compile and issue best practices related to minority recruitment and retention.[64]

(c) Emphasize the role of community colleges in the recruitment of minorities into the auditing profession.

Community colleges are a vital part of the postsecondary education system. They provide open access to post-secondary education, preparing students for transfer to four-year institutions, providing workforce development and skills training, and offering non-credit programs. Moreover, as the cost of higher education continues its upward climb, more and more high-achieving students are beginning their post-secondary study through the community college system.

As of January 2008, approximately 11.5 million students were enrolled in the 1,200 community colleges in the United States: African Americans accounted for 13% of these students, Hispanics, 15%, and Asian/Pacific Islander, 6%.[65]

In August 1992, the Accounting Education Change Commission (AECC), created in the late 1980s by the academic community to examine potential changes to accounting education, recognized the importance of two-year colleges in accounting education. The AECC noted that over half of all students taking their first course in accounting do so at two-year colleges and that approximately one-fourth of the students entering the accounting profession take their initial accounting coursework at two-year colleges. The AECC called for ''greater recognition within the academic and professional communities of the efforts and importance of two-year accounting programs.'' [66]

The Committee also heard from witnesses emphasizing the need to expand minority recruitment initiatives at community colleges.[67]

The Committee believes that more attention to community colleges may provide, in addition to an increase in the overall supply of students, another avenue for minorities to become familiar with and attracted to the auditing profession. Currently none of the largest auditing firms recruits at community colleges because ''individuals who only have associate degrees typically will not have sufficient qualifications to satisfy state licensing requirements.'' [68] The Committee recommends that accreditation of two-year college accounting programs at community colleges be explored and implemented when viable, so that these programs can be relied upon as one of the requisite steps toward fulfilling undergraduate educational requirements.[69] Further, the Committee recommends that auditing firms and educational institutions at all levels support and cooperate in building strong fundamental academic accounting programs at community colleges, including providing internships or financial support for students who begin their studies in two-year programs and may be seeking careers in the auditing profession. The Committee also recommends that auditing firms and four-year colleges and universities and their faculty focus on outreach to community college students in order to support students' transition from community colleges to four-year educational institutions.[70]

(d) Emphasize the utility and effectiveness of cross-sabbaticals and internships with faculty and students at Historically Black Colleges and Universities.

As discussed above, African Americans are significantly under-represented in the auditing profession.

The Committee recommends encouraging a concerted effort to increase the focus upon HBCUs in order to raise the number of African Americans in the auditing profession and urging the HBCUs, auditing firms, corporations, federal and state

[60] Beatrice Sanders, and Leticia B. Romeo, The Supply of Accounting Graduates and the Demand for Public Accounting Recruits—2005: For Academic Year 2003–2004 32 (2005), available at *http://ceae.aicpa.org/NR/rdonlyres/11715FC6–F0A7–4AD6–8D28–6285CBE77315/0/Supply_DemandReport_2005.pdf.*

[61] Dennis R. Reigle, Heather L. Bunning and Danielle Grant, 2008 Trends in the Supply of Accounting Graduates and the Demand for Public Accounting Recruits 59 (2008), available at *http://ceae.aicpa.org/NR/rdonlyres/C1E23302–17D3–4ED5–AE81–B274D9CD7812/0/AICPA_Trends_Reports_2008.pdf.*

[62] Record of Proceedings (June 3, 2008) (Written Submission of Frank K. Ross, Director, Center for Accounting Education, Howard University School of Business, 8), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Ross060308.pdf* (noting that ''auditing firms need to establish aggressive retention programs that focus on confidence * * * the single greatest source of confidence is a good mentor. Unless [an individual has] been blessed with a truly strong mentor, it may be hard to understand how beneficial it is'').

[63] Record of Proceedings (June 3, 2008) (Oral Remarks of Anne M. Lang, Chief Human Resources Officer, Grant Thornton LLP, 83), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-06-03-08.pdf* (stating that '' * * * what [Grant Thornton] find[s], at least in the research that we've done with people coming into the organization and staying in public accounting, is that meaningful and challenging work and the opportunity to advance, based on an individual's career aspirations, is really what keeps our people longer'').

[64] See PricewaterhouseCoopers LLP, Comment Letter Regarding the Draft Report and Draft Report Addendum 5 (June 30, 2008), available at *http://comments.treas.gov/_files/PwCComment LtrTreasCmtDraftandAddendum63008.pdf.*

[65] American Association of Community Colleges, available at *http://www2.aacc.nche.edu/research/index.htm.*

[66] Accounting Education Change Commission, Issues Statement Number 3: The Importance of Two-Year Colleges for Accounting Education (Aug. 1992), available at *http://aaahq.org/aecc/PositionsandIssues/issues3.htm.*

[67] Record of Proceedings (Feb. 4, 2008) (Written Submission of Gilbert R. Vasquez, Managing Partner, Vasquez & Company LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Vasquez02042008.pdf* (noting that auditing firms overlook community colleges where minorities, and specifically Latinos, represent a large student population); Record of Proceedings (Dec. 3, 2007) (Questions for the Record of George S. Willie, Managing Partner, Bert Smith & Co., 2 (Jan. 30, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/QFRs-12-3-07.pdf* (recommending that the auditing profession increase it visibility at community colleges).

[68] Center for Audit Quality, Supplement to Report of the Major Public Company Audit Firms to the Department of the Treasury Advisory Committee on the Auditing Profession 1 (Mar. 5, 2008), available at *http://www.thecaq.org/publicpolicy/data/TRData2008-03-05-Supplement1.pdf.*

[69] See Record of Proceedings (June 3, 2008) (Written Submission of Anne M. Lang, Chief Human Resources Officer, Grant Thornton LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Lang060308.pdf* (supporting the accreditation of community colleges).

[70] See, e.g., Cynthia M. Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 8 (June 26, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter 62708FINAL.pdf* (stating that outreach programs to community colleges could be effective); PricewaterhouseCoopers LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 5 (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtrTreasCmt DraftandAddendum63008.pdf* (suggesting that the Committee recommend steps to transition students from community colleges to four-year colleges and universities).

governments, and other entities to emphasize the use of cross-sabbaticals.[71] Cross-sabbaticals are interactive relationships where faculty and seasoned professionals are regularly represented in the practice and academic environments through exchanges. Evidence suggests that such exchanges can be beneficial, and continued development of such exchanges is expected to provide substantial benefits for all parties.[72] Cross-sabbaticals present an opportunity for ''reflective thinking'' for seasoned professionals.[73]

In addition, the Committee recommends that the over fifty HBCUs with accounting programs require one member of their accounting faculty annually to participate in a cross-sabbatical with a private or public sector entity. The Committee also recommends that the private and public sector entities provide these opportunities, as well as focus on other arrangements to build relationships at these educational institutions.

The Committee received testimony regarding the lack of minority mentors and role models [74] and notes that the profession has recognized this situation.[75] Thus, the Committee also recommends that public company auditing firms intensify their efforts to create internships and mentoring programs for students in accounting and other complementary disciplines, including those from HBCUs and community colleges, as a means to increase the awareness of the accounting profession and its attractiveness among minority students.

(e) Increase the numbers of minority accounting doctorates through focused efforts.

Some dedicated programs have succeeded in attracting minorities to enter and complete accounting doctoral studies.[76] In particular, the PhD Project, an effort of the KPMG Foundation, has worked to increase the diversity of business school faculty.[77] The PhD Project focuses on attracting minorities to business doctoral programs, and provides a network of peer support. Since the PhD Project's establishment in 1994, the number of minority professors at U.S. business schools has increased from 294 to 889.[78] Ninety percent who enter the PhD Project earn their doctorates, and 99% of those who complete their doctorates go on to teach.[79] The PhD Project has received over $17.5 million [80] in funding since 1994 from corporations, foundations, universities, and other interested parties.[81]

The Committee believes that programs such as these can successfully recruit minorities to accounting doctoral studies. The Committee recommends that auditing firms, corporations, and other interested parties advertise existing and successful efforts to increase the number of minority doctorates by developing further dedicated programs.[82] Additionally, the Committee recommends that auditing firms, corporations, and other interested parties maintain and increase the funding of these programs.

Recommendation 3. Ensure a sufficiently robust supply of qualified accounting faculty to meet demand for the future and help prepare new entrants to the profession to perform high quality audits.

The Committee heard testimony from individuals regarding the need to have an adequate supply of faculty with the knowledge and experience to develop qualified professionals for the increasingly complex and global auditing profession.[83]

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[71] See Cynthia M. Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 8 (June 26, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter 62708FINAL.pdf* (agreeing with this Recommendation).

[72] See Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia Fornelli, Executive Director, Center for Audit Quality, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf* (recommending encouraging sabbaticals, internships, and fellowship opportunities, structured to give faculty opportunities to conduct research for promotion and tenure); Record of Proceedings (Feb. 4, 2008) (Oral Remarks of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 68), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-2-4-08.pdf* (stating that sabbaticals deliver professors ''a wealth of knowledge they could bring back in the classroom'').

[73] See Record of Proceedings (Mar. 13, 2008) (Oral Remarks of H. Rodgin Cohen, Chairman, Sullivan & Cromwell LLP, 69), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-03-13-08.pdf* (noting that spending time in the classroom should ''give the [practicing accountant] the time to do the reflective thinking''); Record of Proceedings (Mar. 13, 2008) (Oral Remarks of Zoe-Vonna Palmrose, Deputy Chief Accountant, SEC), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-03-13-08.pdf* (commenting that sabbaticals provide the ''opportunity for reflective thinking'').

[74] See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of Frank K. Ross, Director, Center for Accounting Education, Howard University School of Business, 9), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Ross060308.pdf* (highlighting that a 2006 NABA survey revealed that almost 60% of African American respondents stated that their mentors come from outside of the profession); Record of Proceedings (Feb. 4, 2008) (Written Submission of Gilbert R. Vasquez, Managing Partner, Vasquez & Company LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Vasquez02042008.pdf* (highlighting the lack of Hispanic role models and mentors in the accounting profession).

[75] See Record of Proceedings (July 12, 2006) (Written Testimony of Manuel Fernandez, National Managing Partner—Campus Recruiting, KPMG LLP, to the Subcommittee on Oversight and Investigations of the House Financial Services Committee, 5), available at *http://financialservices.house.gov/media/pdf/071206mf.pdf* (identifying the lack of minority faculty mentors and role models and noting ''[w]hen students of color do not see professors of their own ethnic background on the accounting faculty, they are less apt to consider the option of a career in accountancy''); Record of Proceedings (Dec. 3, 2007) (Questions for the Record of George S. Willie, Managing Partner, Bert Smith & Co., 1 (Jan. 30, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Willie120307.pdf* (recommending the establishment of a mentor program for minority accounting students).

[76] For a list of educational support programs that auditing firms are sponsoring, see Record of Proceedings (Feb. 4, 2008) (Written Submission of Barry Salzberg, Chief Executive Officer, Deloitte LLP, Appendix A), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Salzberg020408.pdf.*

[77] For further information on the PhD Project, see *http://www.phdproject.org/mission.html.*

[78] Record of Proceedings (Feb. 4, 2008) (Written Submission of Barry Salzberg, Chief Executive Officer, Deloitte LLP, Appendix A), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Salzberg020408.pdf.*

[79] See Jane Porter, Going to the Head of the Class: How the PhD Project is Helping to Boost the Number of Minority Professors in B-schools, Business Week Online (Dec. 27, 2006), available at *http://www.businessweek.com/bschools/content/dec2006/bs20061227_926455.htm.*

[80] See Record of Proceedings (July 12, 2006) (Written Testimony of Manuel Fernandez, National Managing Partner—Campus Recruiting, KPMG LLP, to the Subcommittee on Oversight and Investigations of the House Financial Services Committee, 5), available at *http://financialservices.house.gov/media/pdf/071206mf.pdf.*

[81] For further information on the PhD Project, see *http://www.phdproject.org/corp_sponsors.html.*

[82] See, e.g., Cynthia M. Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 9 (June 26, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter 62708FINAL.pdf* (stating that this Recommendation could lead to an increase in the number of minority accounting doctorates); Record of Proceedings (June 3, 2008) (Written Submission of Frank K. Ross, Director, Center for Accounting Education, Howard University School of Business, 11), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Ross060308.pdf* (noting the need to expand support for the PhD Project and similar initiatives).

[83] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of David W. Leslie, Chancellor Professor of Education, College of William and Mary, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Leslie120307.pdf* (noting a 13.3% decline in accounting faculty from 1988 to 2004); Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 5), available at *http://www.treas.gov/offices/domestic-finance/*

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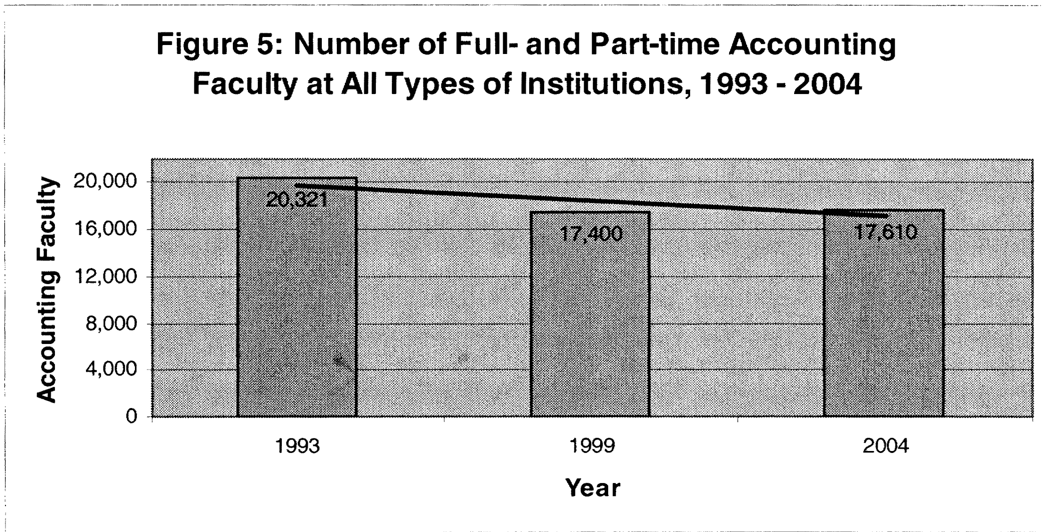
The Committee recognizes that there is a high level of concern about the adequacy of both the near- and the long-term supply of doctoral faculty, especially given the anticipated pace of faculty retirements. According to National Study of Postsecondary Faculty data, the number of full- and part-time accounting faculty at all types of educational institutions fell by 13.3% from 20,321 in 1993 to 17,610 in 2004, while student (undergraduate) enrollment increased by 12.3% over the same period.[84] See Figure 5.



Source: ADVISORY COMMITTEE ON THE AUDITING PROFESSION, RECORD OF PROCEEDINGS (DEC. 3, 2007) (WRITTEN SUBMISSION OF DAVID W. LESLIE, CHANCELLOR PROFESSOR OF EDUCATION, COLLEGE OF WILLIAM AND MARY, 5).

Moreover, the current pipeline of doctoral faculty is not keeping pace with anticipated retirements. In November 2006, it was estimated that one-third of the approximately 4,000 accounting doctoral faculty in the United States were 60 years old or older, and one-half were 55 years old or older.[85] The average retirement age of accounting faculty was 62.4 years.

In terms of specialization within the accounting discipline, an AAA study concluded that only 22% and 27% of the projected demand for doctoral faculty in auditing and tax, respectively, will be met by expected graduations in the coming years.[86] However, 91% and 79% of the projected demand for doctoral faculty in financial accounting and managerial accounting, respectively, will be met.[87]

In addition to the accounting faculty supply issues, the Committee heard testimony from witnesses on the need to ensure faculty are qualified and able to teach students the latest market developments, such as fair value accounting and IFRS. The Committee learned that often new accounting faculty may have little practical experience.[88] Witnesses testified to the difficulty of academics acquiring ''practice-oriented'' knowledge as the bond between the profession and academia is underdeveloped. Witnesses did suggest improving these relationships with incentives for sabbaticals and sharing practice experience.[89]

In this regard, the Committee makes the following recommendations:

(a) Increase the supply of accounting faculty through public and private funding and raise the number of professionally qualified faculty that teach on campuses.

The Committee recognizes that ensuring an adequate supply of doctoral accounting faculty in higher education is crucial to both retaining the academic standing of the discipline on campus and developing well-prepared and educated entry-level professionals. The resource represented by these professionals is essential for high quality audits. The Committee believes that high quality audits are critical to well-functioning capital markets, and therefore the funding necessary to

acap/submissions/02042008/Nusbaum020408.pdf (stating that ''recent years have seen a reduction in accounting faculty, based on a wave of retirements and lack of accounting PhDs coming into the system''); Record of Proceedings (Dec. 3, 2007) (Written Submission of Ira Solomon, R.C. Evans Distinguished Professor, and Head, Department of Accountancy, University of Illinois, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Solomon120307.pdf* (stating that ''the number of persons entering accountancy doctoral programs is too low to sustain the accountancy professoriate'').

[84] Record of Proceedings (Dec. 3, 2007) (Written Submission of David W. Leslie, Chancellor Professor of Education, College of William and Mary, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Leslie120307.pdf.*

[85] James R. Hasselback, 2007 Analysis of Accounting Faculty Birthdates, available at *http://aaahq.org/temp/phd/JimHasselbackBirthdateSlide.pdf.*

[86] R. David Plumlee, Steven J. Kachelmeier, Silvia A. Madeo, Jamie H. Pratt, and George Krull, Assessing the Shortage of Accounting Faculty, 21 Issues in Accounting Education, No. 2, 119 (May 2006).

[87] R. David Plumlee, Steven J. Kachelmeier, Silvia A. Madeo, Jamie H. Pratt, and George Krull, Assessing the Shortage of Accounting Faculty, 21 Issues in Accounting Education, No. 2, 119 (May 2006).

[88] Record of Proceedings (Dec. 3, 2007) (Written Submission of Joseph V. Carcello, Director of Research, Corporate Governance, University of Tennessee, Knoxville, 21), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Carcello120307.pdf.*

[89] Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia Fornelli, Executive Director, Center for Audit Quality, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf* (noting that the auditing firms recognize the need to be more active in sharing practical experiences with academics); Record of Proceedings (Feb. 4, 2008) (Written Submission of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 19), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Reckers020408.pdf* (''[R]elationships between practitioners and academics have so diminished that they are little more than formal liaison assignments involving very few parties from any side * * * [w]here there have been opportunities for interaction (curriculum issues, policy deliberations, research matters), those opportunities have been embraced perceptibly less often.'').

supply the healthy pipeline of doctoral accounting faculty to assist in providing these human capital resources must be made available.[90] The Committee therefore recommends expanding government funding, at both the federal and state level, for accounting doctoral candidates. The Committee also recommends that private sources (including corporations, institutional investors, and foundations as well as auditing firms) continue to be encouraged to fund accounting doctoral candidates.[91] The Committee recognizes and commends the auditing firms' support of doctoral candidates.[92]

Currently, minimum accreditation requirements for accountancy faculty typically require that approximately 50% of full-time faculty have a doctoral degree. Commonly, business school deans and academic vice presidents (those making the budgetary decisions regarding faculty allotments on campuses) interpret this accreditation requirement to require that a minimum of 50% of a department's faculty hold an earned doctorate and are actively engaged in research and publication activity. Although a high percentage of faculty is expected to be professionally qualified (i.e., having recent direct business experience), at times gatekeepers for budget allocations may be less enthusiastic about maximizing the number of professionally qualified teaching slots in a given program. The Committee sees benefits to the increased participation of professionally qualified and experienced faculty, who would bring additional practical business experience to the classrooms, and notes that witnesses and commenters have underscored the benefits of professionally qualified and experienced faculty.[93] Therefore, the Committee recommends that accrediting agencies continue to actively support faculty composed of academically and professionally qualified and experienced faculty.

(b) Emphasize the utility and effectiveness of cross-sabbaticals.

As discussed above, cross-sabbaticals are interactive relationships where faculty and seasoned professionals are regularly represented in the practice and academic environments through exchanges. For example, currently, the Securities and Exchange Commission (SEC) and the FASB offer fellowship programs for professional accountants and accounting academics. Evidence suggests that such exchanges can be beneficial, and continued development of such exchanges is expected to provide substantial benefits for all parties.[94] Cross-sabbaticals present an opportunity for ''reflective thinking'' for seasoned professionals.[95] Academics often face the disincentive of being forced to forgo their full salaries in order to engage in such sabbaticals,[96] and colleges and universities may not encourage professional practice sabbaticals, preferring that the focus of faculty be directed exclusively toward academic research and the number and placement of scholarly articles. The Committee believes that changing both the academic and practice culture will require a plan and commitment of support at the highest institutional levels.

Specifically, the Committee recommends that educational institutions, auditing firms, corporations, federal and state regulators, and others engage in a two-fold strategy to both encourage cross-sabbaticals and eliminate financial or career disincentives for participating in such experiences.[97] Further, the

[90] See Record of Proceedings (June 3, 2008) (Written Submission of Jean C. Bedard, Timothy B. Harbert Professor of Accounting, Department of Accountancy, Bentley College, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard060308.pdf* (noting that ''[f]unding for doctoral study is absolutely critical'').

[91] See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of Kayla J. Gillan, Chief Administrative Officer, RiskMetrics Group, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Gillan060308.pdf* (noting that Sarbanes-Oxley Act Section 109(c)(2) states that monetary penalties assessed by the PCAOB against registered firms and individuals are to be used exclusively to fund merit-based scholarships for accounting undergraduate and graduate students and that Section 109(c)(2) also includes certain procedural requirements for the funds' release, such as Congressional approval, and recommending the Committee suggest eliminating the unnecessary procedural obstacles contained in the statute); PricewaterhouseCoopers LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 6 (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtrTreasCmtDraftandAddendum63008.pdf* (noting that the profession provides funding for faculty, but other private sector participants as well as Congress and state and local officials could contribute funding).

[92] See Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia Fornelli, Executive Director, Center for Audit Quality, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf.* Other commenters have suggested another method to increase the number of faculty and professionals as well as potentially expand diversity within the profession is by increasing the current H–1B quota of 65,000. See, e.g., Cynthia M. Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 9 (June 26, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf* (noting the need to increase the quota for H–1B visas to help increase the number of faculty and the number of professionals knowledgeable of international issues); PricewaterhouseCoopers LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 7 (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtrTreasCmtDraftandAddendum63008.pdf* (recommending immigration reform, such as expansion of H–1B visa program, to increase supply of accounting faculty, international experience, and diversity). But, c.f., Carl Olson, California National University, Comment Letter Regarding Draft Report and Draft Report Addendum 31–32 (June 6, 2008), available at *http://comments.treas.gov/_files/OlsonCommentLetter0606082.pdf* (opposing the use of H–1B visas by accounting firms to recruit employees).

[93] See Andrew D. Bailey, Jr., Professor of Accountancy-Emeritus, University of Illinois, and Senior Policy Advisor, Grant Thornton LLP, Comment Letter Regarding Discussion Outline 19 (Jan. 30, 2008), available at *http://comments.treas.gov/_files/BAILEYCOMMENTSONTREASURYADVISORYCOMMITTEEOUTLINEFINALSUBMISSION13008.doc* (stating that ''[t]here are clearly practice professionals that make excellent contributions to some of the most highly rated accounting programs in the country''); Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia Fornelli, Executive Director, Center for Audit Quality, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf* (stating that accreditation bodies ''revise accreditation standards to allow the employment of more audit professionals, either active or retired, as adjunct professors'').

[94] See Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia Fornelli, Executive Director, Center for Audit Quality, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf* (recommending encouraging sabbaticals, internships, and fellowship opportunities, structured to give faculty opportunities to conduct research for promotion and tenure); Record of Proceedings (June 3, 2008) (Written Submission of William Kinney, Charles & Elizabeth Prothro Regents Chair in Business and Price Waterhouse Fellow in Auditing, University of Texas, Austin, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Kinney060308.pdf* (noting the completion of an August 2007 to February 2008 assignment as an academic fellow in the Professional Practice Group of Office of Chief Accountant at the SEC, and stating that the experience provided a greater understanding of the regulatory process and that ''my students have already benefited through more relevant classes''); Record of Proceedings (Feb. 4, 2008) (Oral Remarks of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 68), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Reckers020408.pdf* (stating that sabbaticals deliver professors ''a wealth of knowledge they could bring back in the classroom'').

[95] See Record of Proceedings (Mar. 13, 2008) (Oral Remarks of H. Rodgin Cohen, Chairman, Sullivan & Cromwell LLP, 69), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-03–13–08.pdf*; Record of Proceedings (Mar. 13, 2008) (Oral Remarks of Zoe-Vonna Palmrose, Deputy Chief Accountant, SEC, 67), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-03–13–08.pdf.*

[96] Record of Proceedings (Feb. 4, 2008) (Oral Remarks of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 67–69), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Reckers020408.pdf* (noting the financial disincentives associated with sabbaticals).

[97] See, e.g., Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 11 (June 27, 2008), available at *http://*

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Committee recommends that university administrators place as high a value on professional sabbaticals for purposes of promotion and tenure as they do for research and scholarly publication.[98]

The Committee also recommends that accrediting agencies establish an expectation that at least one full-time member per year of each accounting faculty group participate in a sabbatical with a private sector or a governmental entity. Auditing firms, corporations, government agencies, and universities should be expected to provide these opportunities with the elimination of any financial disincentives. Further, the Committee recommends expanding faculty fellowship programs in agencies, such as those at the SEC and the FASB, and making them available at the PCAOB. The successful long-term operation of these programs at the SEC and the FASB and the application of appropriate conflict-of-interest and recusal rules have demonstrated that these programs can be maintained and expanded while protecting against conflicts of interest.

(c) Create a variety of tangible and sufficiently attractive incentives that will motivate private sector institutions to fund both accounting faculty and faculty research, to provide practice materials for academic research and for participation of professionals in behavioral and field study projects, and to encourage practicing accountants to pursue careers as academically and professionally qualified faculty.

As discussed above, there are concerns about the adequate supply of accounting faculty and about the need to have faculty who can inject more practical experience into classroom learning. Currently, there are few specific financial incentives encouraging private sector funding of accounting doctoral faculty or sponsoring of professional accountants to teach at educational institutions. Nonetheless, the Committee notes that the profession recognizes the need to support initiatives to increase faculty and is currently directing its efforts to raise funds for such a new initiative.[99]

The Committee also heard from several witnesses regarding the unavailability of data relating to auditing practice and the impact this lack of data has on research and potentially on the profession's sustainability. In particular, witnesses stated that the decline in auditing research materials, including archival or experimental data, will lead to a further decline in faculty and doctoral students specializing in auditing.[100] Since educational institutions normally require publications in top tier journals for promotion or tenure, faculty and doctoral students will conduct research in accounting areas where data are prevalent.

The Committee also heard that encouraging more professionally qualified and experienced faculty will foster a stronger relationship between academia and the profession.[101] Currently, there exists a need for more interaction between academia and the profession.[102] Encouraging practicing accountants to pursue careers as academically and professionally qualified faculty would bring practical business experience to classrooms so that students are better prepared to perform quality audits in the dynamic business environment.

Finally, the Committee recommends that Congress pass legislation creating a variety of tangible incentives for private sector institutions to establish support for accounting and auditing faculty and faculty research, to facilitate access to research data and individuals,[103] and to sponsor transition of professional accountants from practice to teaching positions. These incentives must be sufficiently attractive to companies and auditing firms to affect rapid behavioral change, and should avoid cumbersome levels of administration. The Committee believes that these incentives would

comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf (noting the formation of a task force on cross-sabbaticals with accounting faculty, including those at HBCUs); Record of Proceedings (June 3, 2008) (Written Submission of William Kinney, Charles & Elizabeth Prothro Regents Chair in Business and Price Waterhouse Fellow in Auditing, University of Texas, Austin, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Kinney060308.pdf* (supporting the idea of allowing professors to take sabbaticals and providing direct evidence by describing a recent assignment as an academic fellow in the Professional Practice Group of the SEC's Office of Chief Accountant).

[98] See Joseph V. Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP, Professor and Director of Research—Corporate Governance Center, University of Tennessee, Jean C. Bedard, Professor of Accountancy, Bentley College, and Dana R. Hermanson, Chair of Private Enterprise and Professor of Accounting, Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 4 (May 15, 2008), available at *http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf* (noting the need to ''[p]lace equal emphasis on completing a sabbatical with a private sector institution or government entity as with publishing one 'tier A' paper'').

[99] See Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia Fornelli, Executive Director, Center for Audit Quality, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf* (stating that ''[b]ecause of the profession's concern over the shortage of qualified faculty to teach accounting, the AICPA Foundation, along with the 80 largest CPA firms, are working to raise more than $17 million to fund additional PhD candidates at participating universities'').

[100] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of Joseph V. Carcello, Director of Research, Corporate Governance, University of Tennessee, Knoxville, 21), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Carcello120307.pdf* (''[D]octoral students in * * * [a 2007] Deloitte [Foundation] study indicated that lack of access to public accounting firm and client data represented a severe obstacle to the research they want to conduct, and that this difficulty might result in them focusing on a different accounting sub-area. This issue must be addressed, or auditing may cease to exist as a discipline on many university campuses.''); Record of Proceedings (Feb. 4, 2008) (Written Submission of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 8), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Reckers020408.pdf* (recommending the development of a means ''for researchers to gain access to auditing related data'' and noting, without this means, interest in doctoral auditing programs will continue to decline); Record of Proceedings (Dec. 3, 2007) (Written Submission of Ira Solomon, R.C. Evans Distinguished Professor, and Head, Department of Accountancy, University of Illinois, 7), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Solomon120307.pdf* (noting the lack of auditing research data and the ''drastic decline in auditing research among extant accountancy faculty and among accountancy doctoral students'').

[101] Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia Fornelli, Executive Director, Center for Audit Quality, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf.*

[102] Record of Proceedings (Feb. 4, 2008) (Written Submission of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 19), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Reckers020408.pdf.*

[103] See, e.g., Joseph V. Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP, Professor and Director of Research—Corporate Governance Center, University of Tennessee, Jean C. Bedard, Professor of Accountancy, Bentley College, and Dana R. Hermanson, Chair of Private Enterprise and Professor of Accounting, Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 2 (May 15, 2008), available at *http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf* (recommending that auditing firms and regulators assist academic researchers with access to data relating to the auditing practice); Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 11–12 (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf* (noting the attempt to actively work with academia to find ways to overcome confidentiality issues concerning auditing practice data); Record of Proceedings (June 3, 2008) (Written Submission of Kayla J. Gillan, Chief Administrative Officer, RiskMetrics Group, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Gillan060308.pdf* (recommending that everyone have access to PCAOB inspection data and suggesting the Committee seek legislative amendments to allow this access); Record of Proceedings (June 3, 2008) (Written Submission of William Kinney, Charles & Elizabeth Prothro Regents Chair in Business and Price Waterhouse Fellow in Auditing, University of Texas, Austin, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Kinney060308.pdf* (suggesting legislation encouraging access to data).

provide the necessary impetus to private sector institutions to help increase the number of accounting faculty as well as faculty with significant practical experience.

Recommendation 4. Develop and maintain consistent demographic and higher education program profile data.

The Committee heard testimony regarding the lack of consistent demographic and higher education program profile data concerning the profession.[104] The need for comparable, consistent, periodic information regarding the demographic profile of professional accountants and auditors, related higher education program capacity, entry-level supply and demand of personnel, accounting firm retention and compensation practices, and similar particulars are fundamental to a meaningful understanding of the human capital circumstances impacting the public company auditing profession and its future and sustainability.

Historically, there has been neither an ongoing collection of data nor a centralized location where the general public can access data. For instance, the AICPA publishes a supply and demand study every two years. Additionally, various other groups, such as the AAA, the National Association of State Boards of Accountancy, colleges and universities, and individuals collect some of these data but not in a manner available and useful for research.

Materials such as those supplied by the Center for Audit Quality to the Committee,[105] previous AICPA Supply and Demand studies,[106] and AAA-commissioned demographic research[107] provide examples of the necessary information. In addition, AICPA membership trends, augmented by data available from state boards of accountancy regarding numbers of licensees, may be useful data.

Therefore, the Committee recommends the establishment of a national cooperative committee, comprised of organizations such as the AICPA and the AAA, to encourage periodic consistent demographic and higher education program profile data.[108] The Committee believes that having such data available will increase the ability of auditing firms, corporations, investors, academics, policy makers, and others to understand more fully, monitor and evaluate, and take necessary or desirable actions with respect to the human capital in the auditing profession and its future and sustainability.

Recommendation 5. Encourage the AICPA and the AAA to jointly form a commission to provide a timely study of the possible future of the higher education structure for the accounting profession.

The Committee heard testimony regarding the feasibility of establishing a free-standing, post-graduate professional educational structure.[109] Currently, there is no post-graduate institutional arrangement dedicated to accounting and auditing. Graduate programs in accounting are generally housed within business schools and linked with undergraduate accounting programs.

The history of the development of U.S. educational programs and preparation for accounting careers reveals a pattern of evolution of increasing formal higher education, with accreditation standards following and reinforcing this evolution, and with market needs providing the impetus and context. Today, accrediting agencies have recognized over 150 accounting programs as the result of these programs' improving accounting education as envisioned by prior studies and reports.

In a November 2006 Vision Statement, the chief executive officers of the principal international auditing networks noted the challenges in educating future auditing professionals, including the sheer quantity and complexity of accounting and auditing standards, rapid technological advancements, and the need for specialized industry knowledge.[110] This development in the market leads to a clear need to anticipate and enhance the human capital elements of the auditing profession. As such, this vision statement provides the impetus to commission a group to study and propose a long-term institutional arrangement for accounting and auditing education.

As in the past, in the face of challenges of the changing environment for the profession, the Committee believes that the educational system should thoughtfully consider the feasibility of a visionary educational model. Therefore, the Committee recommends that the AICPA and the AAA jointly form a body to provide a timely study of the possible future of the higher education structure for the

[104] See, e.g., Record of Proceedings (Dec. 3, 2007) (Questions for the Record of David A. Costello, President and Chief Executive Officer, NASBA, 2–4 (Feb. 6, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/QFRs-12-3-07.pdf* (stating that ''[s]ince 1970, * * * NASBA and the AICPA have recognized the need for a national database for Certified Public Accountants and have taken steps leading to the development of the database * * * [c]urrently, NASBA is not aware of a mechanism or database which would provide an accurate count of CPAs, without the effect of 'double counting' ''); Julia Grant, Demographic Challenges Facing the CPA Profession, 20 Research in Accounting Regulation (2008); Record of Proceedings (Dec. 3, 2007) (Written Submission of Ira Solomon, R.C. Evans Distinguished Professor, and Head, Department of Accountancy, University of Illinois, 13), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Solomon120307.pdf* (noting the lack of comprehensive accounting profession supply and demand data and recommending the ''establishment of a continuous and comprehensive system that produces more timely and reliable supply and demand data'').

[105] Center for Audit Quality, Report of the Major Public Company Audit Firms to the Department of the Treasury Advisory Committee on the Auditing Profession (Jan. 23, 2008), available at *http://www.thecaq.org/publicpolicy/data/TRData2008-01-23-FullReport.pdf*.

[106] Dennis R. Reigle, Heather L. Bunning and Danielle Grant, 2008 Trends in the Supply of Accounting Graduates and the Demand for Public Accounting Recruits (2008), available at *http://ceae.aicpa.org/NR/rdonlyres/C1E23302-17D3-4ED5-AE81-B274D9CD7812/0/AICPA_Trends_Reports_2008.pdf*.

[107] David Leslie, Accounting Faculty in U.S. Colleges and Universities: Status and Trends, 1993–2004, A Report of the American Accounting Association (Feb. 19, 2008).

[108] See, e.g., Joseph V. Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP, Professor and Director of Research—Corporate Governance Center, University of Tennessee, Jean C. Bedard, Professor of Accountancy, Bentley College, and Dana R. Hermanson, Chair of Private Enterprise and Professor of Accounting, Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 2 (May 15, 2008), available at http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf (supporting this Recommendation); Ernst & Young LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 23 (June 27, 2008), available at http://comments.treas.gov/_files/EYACAPCommentLetterFINAL2.pdf (supporting this Recommendation); Record of Proceedings (June 3, 2008) (Written Submission of Anne M. Lang, Chief Human Resources Officer, Grant Thornton LLP, 4), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Lang060308.pdf (supporting this Recommendation).

[109] See, e.g., Record of Proceedings (Dec. 3, 2007) (Oral Submission of Joseph V. Carcello, Director of Research, Corporate Governance, University of Tennessee, Knoxville, 3), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/CarcelloOralStatement120307.pdf (recommending that ''the Advisory Committee consider a different model—an education model involving professional schools of auditing * * *''); Record of Proceedings (June 3, 2008) (Written Submission of Anne M. Lang, Chief Human Resources Officer, Grant Thornton LLP, 5), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Lang060308.pdf (noting that the establishment of a commission to study a higher education structure for the accounting profession ''is a very sound'' recommendation). But, c.f., Record of Proceedings (Feb. 4, 2008) (Written Submission of Phillip M.J. Reckers, Professor of Accountancy, Arizona State University, 3), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Reckers020408.pdf (discounting the feasibility of free-standing professional schools).

[110] Global Capital Markets and the Global Economy: A Vision From the CEOs of the International Audit Networks 15 (Nov. 2006).

accounting profession.[111] This commission may include representation from higher education, practitioners from the wide spectrum of the accounting and auditing profession, regulators, preparers, users of the profession's services, and others. The commission would consider the potential role of a postgraduate professional school model to enhance the quality and sustainability of a vibrant accounting and auditing profession. The commission should consider developments in accounting standards and their application, auditing needs, regulatory framework, globalization, the international pool of candidates, and technology. Finally, a blueprint for this sort of enhanced professional educational structure would also require the consideration of long-term market circumstances, academic governance, operations, programs, funding and resources, the role of accreditation, and experiential learning processes.

V. Firm Structure and Finances

In addressing the sustainability of the auditing profession, the Committee sought input on and considered a number of matters relating directly to auditing firms, including audit quality, governance, transparency, global organization, financial strength, ability to access capital, the investing public's understanding of auditors' responsibilities and communications, the limitations of audits, particularly relating to fraud detection and prevention, as well as the effect of litigation where audits are alleged to have been ineffective. The Committee also considered the regulatory system applicable to auditing firms.

While much data was available to the Committee, such information was not exhaustive. Certain information regarding auditors of public companies, the auditor of record, and audit fees is readily available. Auditing firms also provide on a voluntarily basis certain other information they believe useful to clients, regulators, and/or investors. Also, in connection with the work of the Committee, the largest firms provided certain additional input, through the Center for Audit Quality (CAQ), sometimes by individual firm and sometimes in summarized format.[112]

After reviewing these data and receiving testimony from witnesses and comment letters, the Committee focused on a few specific areas: Fraud prevention and detection; federal and state regulatory system; governance; and disclosure of auditor changes.

The Committee recommends that regulators, the auditing profession, and others, as applicable, effectuate the following:

Recommendation 1. Urge the [ ] to create a national center to facilitate auditing firms' and other market participants' sharing of fraud prevention and detection experiences, practices, and data and innovation in fraud prevention and detection methodologies and technologies, and commission research and other fact-finding regarding fraud prevention and detection, and further, the development of best practices regarding fraud prevention and detection.

Public Company Accounting Oversight Board (PCAOB) standards currently require auditors to plan and perform audits to obtain reasonable assurance whether financial statements are free of material misstatement, including those caused by fraud.[113] The Committee considered testimony and commentary regarding auditing firms' responsibilities and practices relating to fraud prevention and detection.[114] The auditing profession itself has recognized the significance of its duties with respect to fraud: ''Perhaps no single issue is the subject of more confusion, yet is more important, than the nature of the obligation of auditors to detect fraud—or intentional material misstatement of financial information by public companies.'' [115]

No formal forum currently exists where auditors and other market participants regularly share their views and experiences relating to fraud prevention and detection in the context of fraudulent financial reporting. The Committee received testimony that it would improve audit quality and benefit the capital markets and investors and other financial statement users for auditing firms to share their fraud detection experiences [116] and to develop best practices relating to fraud prevention and detection.[117]

The Committee believes that a collective sharing of fraud prevention and detection experiences among auditors and other market participants will provide a broad view of auditor practices and ultimately improve fraud prevention and detection capabilities and enable the development of best practices. The Committee also believes that research into industry trends and statistics will help auditors focus and develop procedures to identify areas

[111] See, e.g., Joseph V. Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP, Professor and Director of Research—Corporate Governance Center, University of Tennessee, Jean C. Bedard, Professor of Accountancy, Bentley College, and Dana R. Hermanson, Chair of Private Enterprise and Professor of Accounting, Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 5 (May 15, 2008), available at http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf (supporting this Recommendation and noting the need for these schools to be well-funded and be independent from business schools with control over tenure and promotion); Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 23 (June 27, 2008), available at http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf (supporting this Recommendation and noting the commission should consider other human capital issues including financial and time concerns as well as recruiting individuals from other disciplines); Record of Proceedings (June 3, 2008) (Written Submission of Anne M. Lang, Chief Human Resources Officer, Grant Thornton LLP, 5), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Lang060308.pdf (agreeing with this Recommendation). But, c.f., Record of Proceedings (June 3, 2008) (Written Submission of Frank K. Ross, Director, Center for Accounting Education, Howard University School of Business, 11), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Ross060308.pdf (noting the financial concerns that an extra year of schooling would have on the less affluent, which includes a ''disproportionate number'' of minorities).

[112] Center for Audit Quality, Report of the Major Public Company Audit Firms to the Department of the Treasury Advisory Committee on the Auditing Profession (Jan. 23, 2008); Center for Audit Quality, Second Supplement to Report of the Major Public Company Audit Firms to the Department of the Treasury Advisory Committee on the Auditing Profession (Apr. 16, 2008).

[113] Consideration of Fraud in a Financial Statement, Interim Auditing Standard AU 316 (Pub. Company Accounting Oversight Bd. 2002).

[114] See, e.g., Andrew D. Bailey, Jr., Professor of Accountancy-Emeritus, University of Illinois, and Senior Policy Advisor, Grant Thornton LLP, Comment Letter Regarding Discussion Outline 4 (Jan. 30, 2008), available at http://comments.treas.gov/_files/BAILEYCOMMENTSONTREASURYADVISORYCOMMITTEEOUTLINEFINALSUBMISSION13008.doc; Record of Proceedings (Feb. 4, 2008) (Written Submission of Dennis Johnson, Senior Portfolio Manager, Corporate Governance, California Public Employees' Retirement System, 5), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Johnson020408.pdf.

[115] Serving Global Capital Markets and the Global Economy: A View from the CEOS of the International Audit Networks 12 (Nov. 2006).

[116] See, Record of Proceedings (Feb. 4, 2008) (Questions for the Record of Cynthia M. Fornelli, Executive Director, Center for Audit Quality, 6 (Mar. 31, 2008)), available at http://www.treas.gov/offices/domestic-finance/acap/agendas/-QFRs-2-4-08.pdf; Record of Proceedings (Dec. 3, 2007) (Written Submission of James S. Turley, Chairman and Chief Executive Officer, Ernst & Young LLP, 7), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Turley120307.pdf.

[117] See, e.g., Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 10), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf (stating that ''[s]uccess also requires that the profession work with standard setters and regulators to develop best practices and the infrastructure for effective audits designed to detect material financial fraud'').

and situations at greater risk for fraud. The Committee believes that best practices regarding fraud prevention and detection will enhance the processes and procedures of auditing firms.

The Committee recommends that the [ ] create a national center both to facilitate auditing firms' sharing of fraud prevention and detection experiences, practices, and data and innovation in fraud prevention and detection methodologies and technologies and to commission research and other fact-finding regarding fraud prevention and detection.[118] The Committee also recommends that the auditing firms, forensic accounting firms, certified fraud examiners, investors, other financial statement users, public companies, and academics develop, in consultation with the PCAOB, the Securities and Exchange Commission (SEC), international regulators, and the National Association of State Boards of Accountancy (NASBA), best practices regarding fraud prevention and detection.[119] The Committee also recognizes that a national center and best practices will have greater impact if these concepts are ultimately extended and embraced internationally.

Recommendation 2. Encourage greater regulatory cooperation and oversight of the public company auditing profession to improve the quality of the audit process and enhance confidence in the auditing profession and financial reporting.

The SEC, the PCAOB, and individual state boards of accountancy regulate the auditing profession. The SEC and the PCAOB enforce the securities laws and regulations addressing public company audits. Individual state accountancy laws in fifty-five jurisdictions in the United States govern the licensing and regulation of both individuals and firms who practice as certified public accountants.[120] State boards of accountancy enforce these laws and also administer the Uniform CPA Examination. NASBA serves as a forum for these boards to enhance their regulatory effectiveness and communication.

The Committee believes that enhancing regulatory cooperation and reducing duplicative oversight of the auditing profession by federal and state authorities and enhancing licensee practice mobility among the states are in the best interest of the public and the effective operation of the capital markets. In this regard, the Committee recommends the following:

(a) Institute the following mechanism to encourage the states to substantially adopt the mobility provisions of the Uniform Accountancy Act, Fifth Edition (UAA)[121]: If states have failed to adopt the mobility provisions of the UAA by December 31, 2010, Congress should pass a federal provision requiring those states to adopt these provisions.

The American Institute of Certified Public Accountants (AICPA) and NASBA jointly author the UAA, a model bill which focuses on the education, examination, and experience requirements for certified public accountants. As the name of the bill suggests, the UAA advances the goal of uniformity, in addition to protecting the public interest and promoting high professional standards. In 2006 and 2007, recognizing the changing global economy and the impact of electronic commerce, the AICPA and NASBA proposed amendments to the UAA to allow for a streamlined framework for CPA "mobility" of practice among the states; that is, a CPA's practice privileges would be valid and portable across all state jurisdictions beyond that of the CPA's resident state.[122]

According to NASBA, to date thirty-one states have passed mobility legislation. Two other states currently have mobility legislation introduced and other bills are anticipated in the 2009 legislative session. Almost every state is now discussing or considering mobility, and a number of other state boards of accountancy have voted to support and move forward with mobility.

The Committee considered testimony and commentary on the importance to auditing firms' multi-state practices of the adoption of the UAA's mobility provisions.[123] A NASBA representative testified, "In order for our capital market system to continue to prosper and grow, NASBA recognized the need to ensure that an efficient, effective mobility system is in place that will allow CPAs and their firms, as professional service providers, to serve

[118] See, e.g., Joseph Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP Ernst & Young Professor and Director of Research—Corporate Governance Center University of Tennessee, Jean C. Bedard Timothy B. Harbert Professor of Accountancy Bentley College, Dana R. Hermanson Dinos Eminent Scholar Chair of Private Enterprise and Professor of Accounting Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 6, (May 15, 2008), available at http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf (supporting this Recommendation); Samuel K. Cotterell, Chair, NASBA, and David A. Costello, President and CEO, NASBA, Comment Letter Regarding Draft Report and Draft Report Addendum 2, (June 27, 2008), available at http://comments.treas.gov/_files/June2908LetterheadTreasuryAdvisoryCommitteeontheAuditingProfession.pdf ("Conclusions from, or approaches discussed during, Center deliberations could have an immediate effect on the way accounting practitioners approach the performance of audits and would likely form the basis for consideration of changes in auditing standards."); Record of Proceedings (June 3, 2008) (Written Submission of Kenneth Nielsen Goldmann, Capital Markets and SEC Practice Director, J.H. Cohn LLP, 5), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Goldmann060308.pdf (noting how useful such a center would be to smaller firm auditors in detecting and preventing fraud.); Cynthia Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 10–11, (June 26, 2008), available at http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf (agreeing with this Recommendation and volunteering the Center for Audit Quality to house this center). But c.f., Jim Wanserski, Businessman, Comment Letter Regarding Draft Report and Draft Report Addendum (June 3, 2008), available at http://comments.treas.gov/_files/ACAPDraftReportcommentsJune22008.doc (stating that public company management is key in fraud prevention and detection efforts more so than the external auditor and notes the small percentage of frauds uncovered by public company auditors).

[119] See Dave Richards, Institute of Internal Auditors, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 13, 2008), available at http://comments.treas.gov/_files/IIARESPONSETREASURYADVISORYCOMMITTEEONAUDITING061308.doc (suggesting the Institute of Internal Auditors be included in the listing of organizations providing best practices).

[120] Record of Proceedings (Dec. 3, 2007) (Written Submission of David A. Costello, President and Chief Executive Officer, National Association of State Board of Accountancy, 2), available at http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Costelllo120307.pdf.

[121] Uniform Accountancy Act (*Fifth Ed. July 2007*).

[122] See Record of Proceedings (Dec. 3, 2007) (Questions for the Record of David A. Costello, President and Chief Executive Officer, National Association of State Board of Accountancy, 1 (Feb. 6, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/QFRs-12-3-2007.pdf* ("As the global business community continues to expand, CPAs will be required to practice beyond the state in which they reside. Inefficiencies are created when those individuals are required to complete paperwork and submit a fee for every state in which they perform professional services."). Note that the UAA does require notification or "permitting" for out-of-state firms performing attest services for audit clients headquartered in another state, but not for individual CPAs. See UAA, §§ 7(a)(1), 7(c)(1), and 23(a)(4) (Fifth Ed. July 2007).

[123] See, e.g., Amper, Politziner and Mattia, P.C., Comment Letter Regarding Discussion Outline 2 (Nov. 14, 2007) available at *http://comments.treas.gov/_files/AmperPolitzinerMattia.pdf* (noting that "[t]he ease of performing audits in any state by a valid CPA * * * without requiring to be licensed by each state would be beneficial."); Record of Proceedings (Dec. 3, 2007) (Written Submission of Dennis Nally, Chairman and Senior Partner, PricewaterhouseCoopers LLP, 5) (Dec. 3, 2008), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Nally120307.pdf* (noting that a number of states are cooperating and working towards adopting uniform mobility requirements); Record of Proceedings (Dec. 3, 2007) (Written Submission of James S. Turley, Chairman and Chief Executive Officer, Ernst & Young LLP, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Turley120307.pdf* ("The Treasury Committee should suggest that the states eliminate barriers to interstate practice by universal adoption of the mobility provisions of the Uniform Accountancy Act.").

the needs of American businesses, where ever they are located.'' [124]

The Committee believes that, given the multi-state operations of many public companies and the multi-state practices of many auditing firms, practice mobility will foster a more efficient operation of the capital markets. The Committee recommends the following mechanism to encourage the states to adopt the UAA's mobility provisions: If states have failed to adopt the mobility provisions of the UAA by December 31, 2010, Congress should pass a federal provision requiring those states to adopt these provisions.[125] The Committee recognizes that some state legislatures meet biannually, and for such legislatures this deadline poses a challenge.[126] However, such a deadline should be attainable and will encourage such legislatures to place this issue high on their agenda. The Committee also recommends that the states participate in NASBA's Accountancy Licensee Database (ALD) as a mechanism to assist in maintaining appropriate oversight of CPAs throughout the country regardless of where they practice and that appropriate authorities interpret federal and state privacy regulations to facilitate implementation of the ALD.

(b) Require regular and formal roundtable meetings of regulators and other governmental enforcement bodies in a cooperative effort to improve regulatory effectiveness and reduce the incidence of duplicative and potentially inconsistent enforcement regimes.

Under the federal securities laws, the SEC has enforcement authority over public company auditing firms and oversight authority over the PCAOB under the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley). Sarbanes-Oxley provides the PCAOB with registration, reporting, inspection, standard-setting, and enforcement authority over public company auditing firms.[127] In addition, the fifty-five boards of accountancy license, regulate, and enforce state accountancy laws pertaining to certified public accountants and their firms. In addition, the Department of Justice (DOJ) and state attorneys general can bring enforcement actions against auditing firms and their employees.

The Committee considered testimony from auditing firms on the duplicative and sometimes inconsistent federal and state oversight of the profession.[128] The Committee does recognize that both federal and state regulators have made attempts to coordinate better their enforcement activities.[129] One witness suggested the possible formation of a commission to help improve regulatory effectiveness.[130] Another witness urged state and federal regulatory cooperation to ensure harmonized regulation and licensure.[131]

The Committee recommends mandating regular and formal roundtables of the PCAOB, the SEC, the DOJ, the state boards of accountancy, and the state attorneys general, to periodically review the overall enforcement regimes applicable to the public company auditing profession.[132]

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[124] Record of Proceedings (Dec. 3, 2007) (Written Submission of David A. Costello, President and Chief Executive Officer, National Association of State Board of Accountancy, 6), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Costello120307.pdf.*

[125] See, *e.g.*, Ernst & Young LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 24–25, (June 27, 2008), available at *http://comments.treas.gov/_files/EYACAPCommentLetterFINAL.pdf* (agreeing with this Recommendation); Mayer Hoffman McCann P.C., Comment Letter Regarding Draft Report and Draft Report Addendum 2, (June 17, 2008), available at *http://comments.treas.gov/_files/MayerHoffmanMcCannCommentLetter.pdf* (noting that the lack of mobility impairs firms from assigning the best people to engagements and uses important resources to establish and comply with multiple state licensure); PricewaterhouseCoopers, Comment Letter Regarding Draft Report and Draft Report Addendum 9, (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtrTreasCmtDraftandAddendum63008.pdf;* Bruce Rosen, Eisner LLP, Comment Letter Regarding Draft Report and Draft Report Addendum (May 23, 2008), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.View&Topic_id=9&FellowType_id=1&CurrentPage=1* (noting the importance of putting the right resources in the right place without the needless complexity of differing state requirements). But c.f., Joseph Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP Ernst & Young Professor and Director of Research, Corporate Governance Center University of Tennessee, Jean C. Bedard Timothy B. Harbert Professor of Accountancy Bentley College, Dana R. Hermanson Dinos Eminent Scholar Chair of Private Enterprise and Professor of Accounting Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 6, (May 15, 2008), available at *http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf* (recommending that while there does need to be increased mobility, it could be achieved by a national license for public company audits in addition to state licensing.); William Hermann, Managing Partner, and Gregory Coursen, Director of Professional Standards, Plante & Moran, PLLC Comment Letter Regarding Draft Report and Draft Report Addendum 2, (June 12, 2008), available at *http://comments.treas.gov/_files/Commentletter61208.pdf* (noting the AICPA's success in driving the adoption of the UAA's mobility provision).

[126] See, *e.g.*, Samuel K. Cotterell, Chair, NASBA, and David A. Costello, President and CEO, NASBA, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 27, 2008), available at *http://comments.treas.gov/_files/June2908LetterheadTreasuryAdvisoryCommitteeontheAuditingProfession.pdf* (recommending a later due date because some states may not be able to meet the 2010 deadline due to their legislative calendars); Cynthia Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 14–15, (June 26, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf* (suggesting delaying federal action as states may adopt the provisions on their own or, at the least, moving the deadline to December 31, 2011 to allow states adequate time to adopt the provisions).

[127] Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7211–7219.

[128] See, *e.g.*, Record of Proceedings (Dec. 3, 2007) (Written Submission of Dennis Nally, Chairman and Senior Partner, PricewaterhouseCoopers LLP, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Nally120307.pdf;* Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 7), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf;* Record of Proceedings (Feb. 4, 2008) (Questions for the Record of Barry Salzberg, Chief Executive Officer, Deloitte LLP, App. A 4 (Mar. 31, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/QFRs-2–4-08.pdf* (criticizing duplicative auditing firm investigations by states with no nexus to alleged conduct).

[129] See, *e.g.*, Record of Proceedings (Dec. 3, 2007) (Oral Remarks of David A. Costello, President and Chief Executive Officer, National Association of State Board of Accountancy, 98), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-12–3-07.pdf* (noting that ''[NASBA] has been working with the PCAOB very closely coordinating efforts, trying to diminish as much as possible the redundancy in enforcement'') Record of Proceedings (Dec. 3, 2007) (Written Submission of David A. Costello, President and Chief Executive Officer, National Association of State Board of Accountancy, 6), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Costelllo120307.pdf* (stating that NASBA is assisting state boards in enforcement cases involving multi-state activities).

[130] Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 7), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf* (noting that, ''it would be useful to evaluate the possibility of an interstate commission for the whole of the audit profession. Such a commission would bring together state licensing authorities, the PCAOB, and appropriate professional organizations. It would be the means to rationalize existing disparities in licensing qualifications, continuing education requirements and peer review for non-public company audit practices. It would also enable enforcement of common regulations and license discipline across state and federal jurisdictions.'').

[131] Record of Proceedings (Dec. 3, 2007) (Written Submission of Dennis Nally, Chairman and Senior Partner, PricewaterhouseCoopers LLP, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Nally120307.pdf.*

[132] See *e.g.*, Joseph Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP Ernst & Young Professor and Director of Research—Corporate Governance Center University of Tennessee, Jean C. Bedard Timothy B. Harbert Professor of Accountancy Bentley College, Dana R. Hermanson Dinos Eminent Scholar Chair of Private Enterprise and Professor of Accounting Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 6, (May 15, 2008), available at *http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf* (supporting this Recommendation); Samuel K. Cotterell, Chair, NASBA, and David A. Costello, President and CEO, NASBA, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 27, 2008), available at *http://comments.treas.gov/_files/June2908Letterhead*

These roundtables also should focus on regulatory coordination, improvement, and consistent approaches to enforcement to minimize duplicative efforts. Because of the difficulty and cost of bringing together many different state agencies on a regular basis, the Committee recommends that NASBA assist states by taking a leadership role in coordinating their responsibilities and interests.[133]

(c) Urge the states to create greater financial and operational independence of their state boards of accountancy.

The Committee is concerned about the financial and operational independence of state boards of accountancy from outside influences, such as other state agencies, and the possible effect on the regulation and oversight of the accounting profession. A number of state boards are under-funded[134] and lack the wherewithal to incur the cost of investigations leading to enforcement. In addition, some state boards fall under the centralized administrative ''umbrella'' of other state agencies and lack control of financial resources and/or operational independence necessary to carry out their mandate of public protection.[135] In some cases, board members are nominated by private associations whose constituencies are not necessarily focused on the protection of the public.

The Committee believes that greater independence of state boards of accountancy would enhance their regulatory effectiveness. The Committee recommends that, working with NASBA, states evaluate and develop means to make their respective state boards of accountancy more operationally and financially independent of outside influences.[136] The Committee notes that this Recommendation to ensure the independence of state boards of accountancy is not meant to limit in any way the efforts of regulators and other governmental enforcement bodies to coordinate their regulatory and enforcement activities as recommended in Recommendation 2(b).

Recommendation 3. Urge the PCAOB and the SEC, in consultation with other federal and state regulators, auditing firms, investors, other financial statement users, and public companies, to analyze, explore, and enable, as appropriate, the possibility and feasibility of firms appointing independent members with full voting power to firm boards and/or advisory boards with meaningful governance responsibilities to improve governance and transparency of auditing firms.

In response to the recent corporate accounting scandals, related legislative and regulatory requirements and best practices, public companies enhanced their corporate governance. One of the most prominent alterations to the corporate governance scheme was the increased representation and strengthening of independent members of boards of directors. The New York Stock Exchange and the Nasdaq enhanced their public company listing standards to call for a majority of independent board members.[137] Best practices have gone even further, calling for a ''substantial majority'' of independent directors.[138]

A combination of Sarbanes-Oxley provisions and exchange listing standards mandate fully independent audit committees, nominating/corporate governance, and compensation committees.[139] In addition, independent directors' responsibilities have increased. For example, the independent audit committee now appoints, oversees, and compensates the auditor.[140] Although difficult to quantify the benefits of these enhancements, many have extolled these reforms as improving the quality of board oversight, reducing conflicts of interest, and enhancing investor confidence in public company operations and financial reporting.[141]

Public company auditing firms as private partnerships are not subject to these requirements. Instead, state laws and partnership agreements determine the governance of auditing firms.[142] Often a firm's governing body is

TreasuryAdvisoryCommitteeonthe AuditingProfession.pdf (supporting this Recommendation); Mayer Hoffman McCann P.C., Comment Letter Regarding Draft Report and Draft Report Addendum 2, (June 13, 2008), available at *http://comments.treas.gov/_files/MayerHoffmanMcCannCommentLetter.pdf* (suggesting that all meetings be made public); but, cf. Frank Frankowski, CFO, Airborne Systems, Comment Letter Regarding Draft Report and Draft Report Addendum 1, (June 2, 2008), available at *http://comments.treas.gov/_files/FrankowskiLetter.pdf* (stating that the Recommendation ''will only add to the confusion and lack of focus on the underlying issues'').

133 Samuel K. Cotterell, Chair, NASBA, and David A. Costello, President and CEO, NASBA, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 27, 2008), available at *http://comments.treas.gov/_files/June2908Letterhead TreasuryAdvisoryCommitteeonthe AuditingProfession.pdf* (supporting this Recommendation).

134 National Association of State Boards of Accountancy, Submission in Connection With the December 3, 2007 Meeting of the Advisory Committee on the Auditing Profession (Jan. 2008) (documenting the wide spectrum of funding for individual state boards of accountancy and noting the number of full-time staff per state boards of accountancy office).

135 Statement of Ronald J. Rotaru, Executive Director, Accountancy Board of Ohio, before Ohio H. Finance Committee of the Ohio House of Representatives 1 (Mar. 18, 2005) (''The evidence shows that 'consolidated' states have difficulty in effectively enforcing the statutes governing the profession under their central agency umbrella.'').

136 See Samuel K. Cotterell, Chair, NASBA, and David A. Costello, President and CEO, NASBA, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 27, 2008), available at *http://comments.treas.gov/_files/June2908 LetterheadTreasuryAdvisoryCommitteeonthe AuditingProfession.pdf* (''There is a need to ensure all State Boards of Accountancy have adequate funding to maintain a healthy regulatory environment, which includes the ability to fund the costs of investigations and disciplinary enforcement.''); Ernst & Young LLP Comment Letter Regarding Draft Report and Draft Report Addendum 25, (June 27, 2008), available at *http://comments.treas.gov/_files/EYACAPCommentLetterFINAL.pdf* (agreeing that appropriate operational support is needed to allow regulators the resources to monitor the profession).

137 New York Stock Exchange, Listed Company Manual § 303A.01 (2003); Nasdaq, Manual, Rule 4350(c).

138 See, e.g., The Business Roundtable, Principles of Corporate Governance (May 2002) (recommending, among other things, a substantial majority of independent directors and fully independent audit, corporate governance/nominating, and compensation committees); The Conference Board, Commission on Public Trust and Private Enterprise (Jan. 9, 2003) (recommending, among other things, a substantial majority of independent directors and regular executive sessions of the independent directors).

139 Sarbanes-Oxley Act, 15 U.S.C. § 78–j (2002) (mandating audit committees comprised solely of independent directors); New York Stock Exchange, Listed Company Manual § 303A.04 (2004)(requiring nominating/corporate governance committees comprised solely of independent directors); New York Stock Exchange, Listed Company Manual § 303A.05 (2004) (requiring compensation committees comprised solely of independent directors); New York Stock Exchange, Listed Company Manual § 303A.06 (2003) (mandating compliance with SEC rules requiring audit committees comprised solely of independent directors); Nasdaq, Manual, Rule 4350(d) (mandating compliance with SEC rules requiring audit committees comprised solely of independent directors). Nasdaq, Manual, Rule 4350(c)(3) (requiring independent directors to determine, or recommend to the full Board for determination, the compensation of all executive officers). Nasdaq, Manual, Rule 4350(c)(4) (requiring independent directors to determine, or recommend to the full Board for determination, director nominees.).

140 Sarbanes-Oxley Act, 15 U.S.C. § 78–j (2002).

141 For example, see the commentary accompanying New York Stock Exchange, Listed Company Manual § 303A.01 (''Requiring a majority of independent directors will increase the quality of board oversight and lessen the possibility of damaging conflicts of interest.'') and the interpretive material accompanying Nasdaq Rule 4350, IM–4350–4 (''Independent directors * * * play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to maximize shareholder value in the companies they oversee and guard against conflicts of interest. Requiring that the board be comprised of a majority of independent directors empowers such directors to carry out more effectively these responsibilities.'').

142 Center for Audit Quality, Report of the Major Public Company Audit Firms to the Department of the Treasury Advisory Committee on the Auditing Profession 2 (Jan. 23, 2008).

comprised of elected firm partners.[143] Some firms are currently using advisory boards, although these may not be well-publicized or transparent.

Several witnesses testified to the benefits of improving auditing firm governance and suggested the addition of independent members to the boards of directors.[144] One witness called for an entirely independent board with enhanced responsibilities, including chief executive officer selection, determining partner compensation, and monitoring potential conflicts of interest and audit quality.[145] An auditing firm representative noted that his firm was considering adding independent members on its international governing board.[146]

The Committee believes that enhancing corporate governance of auditing firms through the appointment of independent board members, whose duties run to the auditing firm and its partners/owners, to advisory boards with meaningful governance responsibilities (possible under the current business model), and/or to firm boards could be particularly beneficial to auditing firm management and governance.[147] The Committee also believes that such advisory boards and independent board members could improve investor protection through enhanced audit quality and firm transparency. The Committee is particularly intrigued by the idea of independent board members with duties and responsibilities similar to those of public company non-executive board members.

The Committee recognizes the multiple challenges that instituting a governance structure with independent board members might entail, including compliance with state partnership laws and independence requirements, insurance availability for such directors, and liability concerns.[148] Accordingly, the Committee recommends that the PCAOB and the SEC, in consultation with federal and state regulators, auditing firms, investors, other financial statement users, and public companies, analyze, explore, and enable, as appropriate, the possibility and feasibility of firms' appointing independent board members and advisory boards.[149] The Committee notes that the PCAOB and the SEC should consider the size of auditing firms in analyzing and developing any governance proposals.[150]

Recommendation 4. Urge the SEC to amend Form 8–K disclosure requirements to characterize appropriately and report every public company auditor change and to require auditing firms to notify the PCAOB of any premature engagement partner changes on public company audit clients.

In 2006, over 1,300 public companies changed their auditor and from 2002 to 2006 over 6,500 public companies changed their auditor.[151] Under current SEC regulations, a public company must disclose any auditor change on Form 8–K.[152] SEC regulations require disclosure of any disagreements on financial disclosures during the preceding two years prior to a resignation or termination and whether some issue, such as the auditor's inability to rely on management's representations, may put into question financial disclosure reliability. SEC regulations also allow a public company to request that the auditor respond with a letter addressed to the SEC stating whether it agrees with the company's disclosure and, if it does not agree, stating why.

While the SEC does attempt to uncover through its rules whether the auditor change relates to disagreements over accounting and reporting matters, the SEC rules do not require a public company to provide a reason for the auditor's departure in the vast majority of cases. The limitations of the existing disclosure requirements have resulted in companies failing to disclose any reason for their auditor changes in

[143] Center for Audit Quality, Report of the Major Public Company Audit Firms to the Department of the Treasury Advisory Committee on the Auditing Profession 2–22 (Jan. 23, 2008) (detailing the various governance structures of the largest six auditing firms); Cynthia M. Fornelli, Executive Director, Center for Audit Quality, and James S. Turley, Chair, Governing Board, Center for Audit Quality, and Chairman and CEO, Ernst & Young LLP, Comment Letter Regarding Discussion Outline 13 (Nov. 30, 2007), available at *http://comments.treas.gov/_files/Treasurycommentletterfinal11302007.pdf* (noting the largest auditing firms have supervisory boards overseeing management).

[144] See, e.g., Andrew D. Bailey, Jr., Professor of Accountancy-Emeritus, University of Illinois, and Senior Policy Advisory, Grant Thornton LLP, Comment Letter Regarding Discussion Outline 12 (Jan. 30, 2008), available at *http://comments.treas.gov/_files/BAILEYCOMMENTSONTREASURYADVISORYCOMMITTEEOUTLINEFINALSUBMISSION13008* ("[I]ndependent board members similar to those found on public company boards would be a good governance practice and would signal the markets about the firms' positive commitment to the public good."); Record of Proceedings (Feb. 4, 2008) (Written Submission of Dennis Johnson, Senior Portfolio Manager, Corporate Governance, California Public Employees' Retirement System, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Johnson020408.pdf* (stating that independent board of directors could possibly decrease potential conflicts of interest).

[145] Record of Proceedings (Feb. 4, 2008) (Written Submission of Paul G. Haaga Jr., Vice Chairman, Capital Research and Management Company, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Haaga020408.pdf.*

[146] Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 7), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf.*

[147] Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 7), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf* ("Such a change in the governance model may be one way to strengthen our ability to serve market participants and reinforce independence.").

[148] Several witnesses commented on these difficulties. See, e.g., Ernst & Young LLP Comment Letter Regarding Draft Report and Draft Report Addendum 25–26, (June 27, 2008), available at *http://comments.treas.gov/&_files/EYACAPCommentLetterFINAL.pdf;* Cynthia Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 17–19, (June 26, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf;* William Hermann, Managing Partner, and Gregory Coursen, Director of Professional Standards, Plante & Moran, PLLC Comment Letter Regarding Draft Report and Draft Report Addendum 1–2, (June 13, 2008), available at *http://comments.treas.gov/&_files/Commentletter61208.pdf;* Record of Proceedings (June 3, 2008) (Written Submission of Barry Mathews, Deputy Chairman, Aon Corporation, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Mathews060308.pdf.;* David McDonnell, Chief Executive Officer, Grant Thornton International Ltd, and Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Ltd Board of Governors, Comment Letter Regarding Draft Report and Draft Report Addendum 4 (June 27, 2008) available at *http://comments.treas.gov/_files/GTCommentlettertoACAPJune2008_FINAL.pdf.*

[149] See Record of Proceedings (June 3, 2008) (Written Submission of Nell Minow, Editor and Co-Founder, The Corporate Library, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Minow060308.pdf.* But, cf. Wayne Kolins, Director of Assurance, BDO Seidman LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 3–4, (June 27, 2008) available at *http://comments.treas.gov/_files/ResponsetoAdvisoryCommittee0627final.PDF* (advising the Committee to keep in mind the fact that accounting firms operate differently than public companies and that the PCAOB currently reviews information that would concern independent board members); Paul Lee, Director, Hermes Equity Ownership Services Limited, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 13, 2008), available at *http://comments.treas.gov/_files/ACAPresponse13Jun08.pdf.*

[150] See Record of Proceedings (June 3, 2008) (Written Submission of Kenneth Nielsen Goldmann, Capital Markets and SEC Practice Director, J.H. Cohn LLP, 4–5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Goldmann060308.pdf* (noting that smaller firms do not have large public company audit practices so the concept of public board members may be difficult).

[151] See Mark Grothe and Blaine Post, Speak No Evil, Glass Lewis & Co Research 12 (May 21, 2007).

[152] Form 8–K, available at *http://www.sec.gov/about/forms/form8-k.pdf.*

approximately 70% of the more than 1,300 auditor changes occurring in 2006.[153]

The Committee considered testimony and commentary regarding the lack of clear disclosure surrounding auditor changes. Testimony and commentary viewed the lack of transparency surrounding auditor changes as detrimental to investor confidence in financial reporting.[154] Testimony and commentary suggested greater transparency regarding auditor changes would compel audit committees to more closely evaluate auditor selection decisions and lead to greater competition in the audit market.[155]

The Committee believes that explicitly stating the reason for an auditor change will assist investors in determining the quality of financial reporting and subsequent investment decisions. The Committee recommends that the SEC amend its Form 8–K disclosure on auditor changes by providing for the following mechanism:[156] The public company would file within four days of an auditor change a Form 8–K disclosing that an auditor had resigned, was terminated, or did not seek reappointment; the company would appropriately characterize and state in all cases in plain English the reason or reasons for the change. The company would also disclose whether its audit committee agreed with the disclosure it has provided. The company would also provide the auditor with a copy of the disclosure and request a response as to the accuracy of the disclosure. The company would include any response as an exhibit to the company's Form 8–K filing, or if received following the due date for the Form 8–K, in a subsequent Form 8–K. As discussed above under current SEC regulations, the public company can request that the auditor respond to the company's statements in the Form 8–K regarding disagreements over accounting and financial matters.

In addition, the Committee recommends that auditing firms notify the PCAOB of any engagement partner changes on public company audits if made before the normal rotation period and, other than for retirement, the reasons for those changes.[157]

Recommendation 5: Urge the PCAOB to undertake a standard-setting initiative to consider improvements to the auditor's standard reporting model. Further, urge that the PCAOB and the SEC clarify in the auditor's report the auditor's role in detecting fraud under current auditing standards and further that the PCAOB periodically review and update these standards.

The auditor's report is the primary means by which the auditor communicates to the users of financial statements regarding its audit of financial statements. The standard auditor's report, not much altered since the 1930s,[158] identifies the financial statements audited, the scope and nature of the audit, the general responsibilities of the auditor and management, and the auditor's opinion.[159] In addition, for companies subject to Sarbanes-Oxley's internal control requirements, the auditor's report includes an attestation as to internal control over financial reporting.[160] The auditor's opinion on the financial statements states whether these statements present fairly, in all material respects, a company's financial position, results of operations, and cash flows in conformity with generally accepted accounting principles.[161]

Many consider the auditor's reporting model a pass/fail model because the auditor opines whether the statements are fairly presented (pass) or not (fail).[162] Since the SEC does not accept filings with financial statements that

[153] See Mark Grothe and Blaine Post, Speak No Evil, Glass Lewis & Co Research 12 (May 21, 2007).

[154] See, e.g., Andrew D. Bailey, Jr., Professor of Accountancy-Emeritus, University of Illinois, and Senior Policy Advisor, Grant Thornton LLP, Comment Letter Regarding Discussion Outline 4 (Jan. 30, 2008), available at *http://comments.treas.gov/_files/Baileycommentsontreasuryadvisorycommitteeoutlinefinalsubmission13008.doc* (recommending SEC and PCAOB disclosures of auditor changes to enhance the growth of smaller auditing firms); Record of Proceedings (Feb. 4, 2008) (Oral Remarks of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 193–94), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-2-4–08.pdf* (calling for expanded Form 8–K disclosure requirements as ''in the best interest of investors'').

[155] See, e.g., Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf* (noting that the Committee should examine ''[c]omprehensive disclosures about reasons for auditor switches'').

[156] See Record of Proceedings (June 3, 2008) (Written Submission of Kenneth Nielsen Goldmann, Capital Markets and SEC Practice Director, J.H. Cohn LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Goldmann060308.pdf* (recommending additional disclosure regarding the relationship between the successor auditor and the company); Dennis Johnson, CFA, Senior Portfolio Manager, CalPERS, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 13, 2008), available at *http://comments.treas.gov/_files/200806;_13ACAP_addendum_commentltr.pdf* (supporting the Recommendation); Record of Proceedings (June 3, 2008) (Written Submission of Nell Minow, Editor and Co-Founder, The Corporate Library, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Minow060308.pdf* (stating that the Recommendation seems consistent with Sarbanes-Oxley Act). But, cf. Ernst & Young LLP Comment Letter Regarding Draft Report and Draft Report Addendum 27, (June 27, 2008), available at *http://comments.treas.gov/_files/EYACAPCommentLetterFINAL.pdf* (worrying that the results will be ''boilerplate disclosure that is of little benefit to investors while an expansion of the list of objective criteria could be more useful''); Wayne Kolins, Director of Assurance, BDO Seidman LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 4, (June 27, 2008) available at *http://comments.treas.gov/_files/ResponsetoAdvisoryCommittee0627final.PDF* (stating ''a requirement for auditors to respond as to the accuracy of disclosures relating to subjective reasons is not feasible, since auditors have no basis for agreeing or disagreeing with management regarding why they dismissed the auditors'').

[157] See, e.g., Record of Proceedings (Feb. 4, 2008) (Written Submission of Paul G. Haaga Jr., Vice Chairman, Capital Research and Management Company, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Haaga020408.pdf* (calling for public disclosure on audit partner changes other than for rotation requirements); Record of Proceedings (Feb. 4, 2008) (Oral Remarks of D. Paul Regan, President and Chairman, Hemming Morse Inc., 194–195 (Feb. 4, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-2–4–08.pdf* (commenting that ''if an audit partner is * * * rotated [early] off of an issuer, there ought to be a disclosure, and there ought to be communication from the partner who was rotated off early as to [the reason for the early rotation] * * * because in many instances * * * there [i]s controversy * * *''). But, cf. Ernst & Young LLP Comment Letter Regarding Draft Report and Draft Report Addendum 27, (June 27, 2008), available at *http://comments.treas.gov/_files/EYACAPCommentLetterFINAL.pdf* (''Unscheduled changes in an engagement partner are often due to circumstances that have no impact on the relationship between the client and the Auditor''); Wayne Kolins, Director of Assurance, BDO Seidman LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 12, (June 27, 2008) available at *http://comments.treas.gov/_files/ResponsetoAdvisoryCommittee0627final.PDF* (stating that no benefit is gained in requiring notification to the PCAOB when there is premature changes in the engagement partner); PricewaterhouseCoopers, Comment Letter Regarding Draft Report and Draft Report Addendum 20, (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtrTreasCmtDraftandAddendum63008.pdf* (noting that there are many reasons for the engagement partner to change including personal as well as professional and that the real issue is ''whether the firm has the appropriate quality control processes in place'').

[158] For a historical analysis of the evolution of the auditor's report, see George Cochrane, The Auditor's Report: Its Evolution in the U.S.A., in Perspectives in Auditing 16 (D.R. Carmichael and John J. Willingham 2d. ed. 1975).

[159] Reports on Audited Financial Statements, Interim Auditing Standard AU Section 508.08 (Pub. Company Accounting Oversight Bd. 2002).

[160] An Audit of Internal Control Over Financial Reporting That Is Integrated With An Audit of Financial Statements, Auditing Standard No. 5, para. 85 (Pub. Company Accounting Oversight Bd. 2007).

[161] Reports on Audited Financial Statements, Interim Auditing Standard AU Section 508.07–.08 (Pub. Company Accounting Oversight Bd. 2002).

[162] Public Company Accounting Oversight Board, Standing Advisory Group Meeting Briefing Paper: Auditor's Reporting Model 3 (Feb. 16, 2005).

''fail,''[163] the vast number of audit reports issued rarely departs from the exact standardized wording. Some believe this pass/fail model with its standardized wording does not adequately reflect the amount of auditor work and judgment.

Over thirty years ago, the audit ''expectations gap'' was coined[164] and has been a topic of controversy ever since. The expectations gap has been defined as ''the difference between what the public and users of financial statements perceive the role of an audit to be and what the audit profession claim is expected of them during the conduct of an audit.''[165] The Committee considered testimony and commentary regarding this ''expectations gap'' between the public's expectations regarding auditor responsibility for fraud detection and the auditor's required and capable performance of fraud detection.[166]

Public investors have appropriately raised questions when large frauds have gone undetected. Among the attributes that the public expects of auditors is a clear acknowledgment of their responsibility for the reliability of financial statements, particularly with respect to the detection of fraud, notwithstanding the recognition that a company's management and board have the primary role in preventing fraud.[167] Some say the public may believe that auditors will detect more fraud than those in the profession believe can be reasonably expected. Both beliefs may be unreasonable in some circumstances. And, there are difficulties of detecting fraud, especially before it has resulted in a material misstatement. However, even those involved directly in the audit process on a daily basis from time to time have differing views as to what the auditor should and should not have been expected to discover.

According to existing auditing standards and SEC rules, management prepares and has the primary responsibility for the accuracy of financial statements and for prevention and identification of fraud and the auditor's role is to provide reasonable assurance that the financial statements are free of material misstatement.[168] These concepts are embedded in the current auditing and audit reporting standards that require that the auditor ''plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement whether caused by error or fraud.''[169] It is noteworthy that the current standard auditor's report does not actually mention ''fraud'' and is silent about the auditor's responsibility to *find* fraud.

Clarification of the expectations gap and confusion about auditor responsibility to detect fraud are not the only criticisms of the standard auditor's report. Over the years there have been numerous recommendations that the standard report be improved. In 1978, the Commission on Auditors' Responsibilities (Cohen Commission) made a simple observation: ''For the largest corporations in the country, an audit may involve scores of auditors and tens of thousands of hours of work for which the client may pay millions of dollars. Nevertheless, the auditor's standard report compresses that considerable expenditure of skilled effort into a relatively few words and paragraphs.''[170] The Cohen Commission then called for an expansion of the auditor's report to include a report not merely on the financial statements, but covering the entire audit function.[171] The Cohen Commission reasoned that this new more comprehensive information would benefit users, but also clarify the role and, consequently, the legal standing of the auditor in relation to the audit.[172]

In 1987, the National Commission on Fraudulent Financial Reporting (Treadway Commission) recommended that the standard auditor's report more clearly identify the auditor's responsibilities, the degree to which users can rely on the audit, and the limitations on the audit process.[173] The Treadway Commission aimed to reaffirm that management has ''primary responsibility for financial statements'' and to caution users of financial statements from placing more than ''reasonable'' assurance on the audit process.

More recently, the American Assembly called for differing attestation standards for different parts of the financial statements, depending on the amount of uncertainty and judgment required in making certain determinations.[174] In addition, a February 2008 CFA Institute survey indicated that 80% of its member respondents believe that the auditor's report should provide specific information about how the auditor

[163] SEC Staff Accounting Bulletin, Topic 1E—Requirements for Audited or Certified Financial Statements [Interpretive response to question 2], (stating, in part, ''[a]ccordingly, auditor reports filed with the SEC must include unqualified opinions'').

[164] C.D. Liggio, The Expectation Gap: The Accountant's Waterloo Vol. 3 No. 3 Journal of Contemporary Business 27 (1974).

[165] Marianne Ojo, Eliminating the Audit Expectations Gap: Myth or Reality?, (Feb. 2006), available at *http://mpra.ub.uni-muenchen.de/232/1/MPRA_paper_232.pdf.*

[166] See, e.g, Andrew D. Bailey, Jr., Professor of Accountancy—Emeritus, University of Illinois, and Senior Policy Advisor, Grant Thornton LLP, Comment Letter Regarding Discussion Outline 4 (Jan. 30, 2008), available at *http://comments.treas.gov/_files/BAILEYCOMMENTSONTREASURYADVISORYCOMMITTEEOUTLINEFINALSUBMISSION13008.doc* (stating that ''[i]f the discovery of material errors and fraud is not a major part of what the audit is about, it is not clear what value-added service the auditor offers the investor and capital markets''); Record of Proceedings (Feb. 4, 2008) (Questions for the Record of Cynthia M. Fornelli, Executive Director, Center for Audit Quality, 5 (Mar. 31, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/QFRs-2–4–08.pdf* (''While auditors provide reasonable assurance that fraud material to the financial statements will be detected, they cannot be expected to provide absolute assurance that all material fraud will be found. Cost-benefit constraints and the lack of governmental subpoena and investigative powers, among other factors, make absolute assurance impossible.''); Record of Proceedings (Feb. 4, 2008) (Written Submission of Dennis Johnson, California Public Employees' Retirement System, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Johnson020408.pdf* (stating that ''[o]f critical importance to investors is the responsibility of auditors to detect fraud and improve the timely communication of these frauds to investors and shareowners.''); Serving Global Capital Markets and the Global Economy: A View From the CEOs of the International Audit Networks 12 (Nov. 2006) (''Nonetheless, there is a significant 'expectations gap' between what various stakeholders believe auditors should do in detecting fraud, and what audit networks are actually capable of doing, at the prices that companies or investors are willing to pay for audits.'').

[167] See, e.g., Sir David Tweedie, Challenges Facing the Auditor: Professional Fouls and the Expectation Gap, Deloitte, Haskins and Sells Lecture, University College, Cardiff 20 (''The public appears to require (1) a burglar alarm system (protection against fraud) * * * (2) a radar station (early warning of future insolvency) * * * (3) a safety net (general re-assurance of financial well-being) * * * (4) an independent auditor (safeguards for auditor independence) * * * and (5) coherent communications (understanding of audit reports)'').

[168] See, e.g., Commission on Auditors' Responsibilities, Report, Conclusions, and Recommendations xii (1978) (concluding that, after having been established to investigate the existence of such a gap, ''[a]fter considerable study of available evidence and its own research......such a gap does exist''). For a more recent article, see Dan L. Goldwasser, The Past and Future of Reasonable Assurance, The CPA Journal (Nov. 2005), available at *http://www.nysscpa.org/cpajournal/2005/1105/special_issue/essentials/p28.htm.*

[169] Consideration of Fraud in a Financial Statement, Interim Auditing Standard AU 316 (Pub. Company Accounting Oversight Bd. 2002).

[170] Commission on Auditors' Responsibilities, Report, Conclusions, and Recommendations 71 (1978).

[171] Commission on Auditors' Responsibilities, Report, Conclusions, and Recommendations 75 (1978).

[172] Commission on Auditors' Responsibilities, Report, Conclusions, and Recommendations 75–76 (1978).

[173] National Commission on Fraudulent Financial Report, Report of the National Commission on Fraudulent Financial Reporting (Oct. 1987).

[174] American Assembly, The Future of the Accounting Profession 12–13 (Nov. 13–15, 2003); American Assembly, The Future of the Accounting Profession: Auditor Concentration 21 (May 23, 2005).

reached its opinion.[175] A majority of survey respondents thought it was very important to have the auditors identify key risk areas, significant changes in risk exposures, and amounts either involving a high degree of uncertainty in measurement and significant assumptions or requiring a higher level of professional judgment.[176]

In 2005, the PCAOB's Standing Advisory Group (SAG), which advises the PCAOB on the establishment of auditing and related professional practice standards, considered whether the auditor's report should include more information relating to the auditor's judgments regarding financial reporting quality.[177] The SAG also considered whether required auditor communications to audit committees, such as the auditor's judgments about accounting principles [178] and critical accounting policies and practices,[179] should be incorporated into the auditor's report.[180] The PCAOB has not yet taken up a standard-setting initiative regarding the auditor's report.

Foreign jurisdictions are also currently considering changes to their auditor's reports. For instance, the European Commission under the Eighth Directive is authorized to develop its own ''European Audit Report'' or adopt the International Federation of Accountants' International Auditing and Assurance Standards Board's recently revised auditor's report standard.[181] In December 2007, the Audit Practices Board, a part of the United Kingdom's Financial Reporting Council, issued a Discussion Paper seeking comment on potentially altering the auditor's report.[182] Currently in Germany, public companies are generally required to issue a long-form auditor's report, discussing matters such as the company's economic position and trend of business operations and the nature and scope of the auditor's procedures. The Committee is cognizant that this debate over such disclosures is unfolding in a litigation environment different from that in the United States.

This Committee has also heard testimony regarding expanding the auditor's report.[183] One witness noted that some institutional investors believe an expanded auditor's report would enhance investor confidence in financial reporting and recommended exploring a more ''narrative'' report in areas, such as ''estimates, judgments, sufficiency of evidence and uncertainties.'' [184]

The Committee notes that the increasing complexity of global business operations are compelling a growing use of judgments and estimates, including those related to fair value measurements, and also contributing to greater complexity in financial reporting. The Committee believes this complexity supports improving the content of the auditor's report beyond the current pass/fail model to include a more relevant discussion about the audit of the financial statements. While there is not yet agreement as to precisely what additional information is sought by and would be useful to investors and other users of financial statements, the Committee concludes that an improved auditor's report would likely lead to more relevant information for users of financial statements and would clarify the role of the auditor in the financial statement audit.

The Committee therefore recommends that the PCAOB address these issues, both long-debated and increasingly important given the use of judgments and estimates, by undertaking a standard-setting initiative to consider improvements to the auditor's reporting model.[185] With regards to this initiative, the PCAOB should consult with investors, other financial statement users, auditing firms, public companies, academics, other market participants, and other state, federal, and foreign regulators. In view of the desirability of improving the quality of financial reporting and auditing on a global basis, the PCAOB should also consider the developments in foreign jurisdictions that improve the quality and content of the auditor's report and should consult with international regulatory bodies as appropriate. The PCAOB should also take cognizance of the proposal's potential legal ramifications, if any, to auditors.[186]

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[175] CFA Institute, February 2008 Monthly Question Results (Feb. 2008), available at *http://www.cfainstitute.org/memresources/monthlyquestion/2008/february.html.*

[176] CFA Institute, February 2008 Monthly Question Results (Feb. 2008), available at *http://www.cfainstitute.org/memresources/monthlyquestion/2008/february.html.*

[177] Public Company Accounting Oversight Board, Standing Advisory Group Meeting: Auditor's Reporting Model (Feb. 16, 2005).

[178] For this requirement, see Communications With Audit Committees, Interim Auditing Standard AU Section 380.11 (Public Company Accounting Oversight Bd. 2002).

[179] For this requirement, see Sarbanes-Oxley Act, 15 U.S.C. § 78j–1 (2002).

[180] Public Company Accounting Oversight Board, Standing Advisory Group Meeting: Auditor's Reporting Model 4–5 (Feb. 16, 2005).

[181] Directive 2006/43/EC of the European Parliament and of the Council Art. 28 (May 17, 2006); Auditing Practices Board, Discussion Paper—The Auditor's Report: A Time For Change? 6 (Dec. 2007).

[182] Auditing Practices Board, Discussion Paper—The Auditor's Report: A Time For Change? (Dec. 2007).

[183] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of Dennis M. Nally, Chairman and Senior Partner, PricewaterhouseCoopers LLP, 7), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Nally120307.pdf* (supporting the Committee's considering whether to change the auditor's report's content given single financial reporting standards, more cohesive global auditing standards, and trends, like fair value measurement); Record of Proceedings (Dec. 3, 2007) (Oral Remarks of Ashwinpaul C. Sondhi, President, A. C. Sondhi & Associates, LLC, 255–57), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-12–3-07.pdf;* Record of Proceedings (Dec. 3, 2007) (Oral Remarks of James S. Turley, Chairman and Chief Executive Officer, Ernst & Young LLP, 253–54), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-12–3-07.pdf.*

[184] Record of Proceedings (Feb. 4, 2008) (Written Submission of Richard Fleck, Global Relationship Partner, Herbert Smith LLP, 17, 21), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fleck02042008.pdf.*

[185] See, e.g., Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 20 (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf* (recommending that the Committee suggest to the PCAOB to include the International Auditing and Assurance Standards Board (IAASB) and the Auditing Standards Board (ASB), who are evaluating the auditor's report, in undertaking this initiative); Roderick Hills, Chairman, Center for Strategic and International Studies, Hills Program on Governance, Comment Letter Regarding Discussion Outline 3 (June 5, 2008), available at *http://comments.treas.gov/_files/commentsregardingdraftreportofadvisorycomm.pdf* (agreeing that a new auditor's report standard is needed to allow auditors to offer a range of attestations to reflect the range of values possible); Dennis Johnson, CFA, Senior Portfolio Manager, CalPERS, Comment Letter Regarding Draft Report and Draft Report Addendum 1–2, (June 13, 2008), available at *http://comments.treas.gov/_files/200806_13ACAP_addendum_commentltr.pdf* (supporting the Recommendation). But, cf., Arnold Hanish, Financial Executives International, Chair, Committee on Corporate Reporting, Comment Letter Regarding Draft Report and Draft Report Addendum 4–5 (July 3, 2008), available at *http://comments.treas.gov/_files/FEICCRTreasuryACAPCommentLetterFiled73080.pdf* (suggesting that the Recommendation ''can add even more stress to an already stressed system'' and that changes can cause confusion); Lee Seidler, CPA, Comment Letter Regarding Draft Report and Draft Report Addendum (June 27, 2008), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.View&Topic_id=9&FellowType_id=1&CurrentPage=1* (stating that expansion always includes exculpatory language that is not useful).

[186] See, e.g., Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 20 (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf* (''[T]he different liability systems where these reports exist must be taken into account when assessing the standard language included in the auditor's report in the U.S. and the U.S. litigation system''); Cynthia Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 22, (June 27, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf* (suggesting the Committee ''acknowledge that the risk of catastrophic liability must inform any potential changes to the auditor's report''); PricewaterhouseCoopers, Comment Letter

Continued

Commentary has also suggested that auditors must more effectively communicate their responsibility regarding fraud detection with investors and the capital markets. The Committee agrees with this suggestion. Accordingly, the Committee believes that the auditor's report should articulate clearly to investors the auditor's role and limitations in detecting fraud.[187] The Committee believes that expressly communicating to investors, other financial statement users, and the public the role of auditors in finding and reporting fraud would help narrow the ''expectations gap.''

In addition, the Committee recommends that the PCAOB and the SEC clarify in the auditor's report the auditor's role and limitations in detecting fraud under current auditing standards. In addition, the Committee recommends, in light of this continuing ''expectations gap,'' that the PCAOB review the auditing standards governing fraud detection and fraud reporting. Specifically, the Committee recommends that the PCAOB periodically review and update these standards.[188]

Recommendation 6: Urge the PCAOB to undertake a standard-setting initiative to consider mandating the engagement partner's signature on the auditor's report.

SEC regulations require that the auditor's report be signed.[189] Under current requirements, the auditor's report signature block shows the auditing firm's name, not the engagement partner's. In 2005, the PCAOB's SAG considered whether the audit partner and a concurring partner should sign the auditor's report in their own names.[190] The Committee has received testimony and commentary regarding the benefits and complexities of engagement partner signatures.[191] The Committee has also discussed and debated the merits of the senior engagement partner signing the auditor's report.[192] Advocates believe that such signatures will foster greater accountability of the individuals signing the auditor's report, will enhance transparency, and may improve audit quality, and they also note the signature will create no additional liability concerns for the engagement partner.[193] These supporters analogize the signatures to the chief executive officer and chief financial officer certifications under Section 302 of Sarbanes-Oxley and directors' signatures on public company annual reports. The signature will also enhance the status of the engagement partner, putting the partner on the same level as the chief executive officer and chief financial officer. Opponents of such signatures argue that the auditing firm operates as a team and takes responsibility for the audit, but not individual partners. They also argue that no improvement in audit quality will result from such a signature.[194]

The Committee notes that engagement partner signatures are required in other jurisdictions. The European Union's (EU) Eighth Directive requires that the engagement partner sign the auditor's report.[195] Even prior to the Eighth Directive, several European countries, including France, Germany, and Luxembourg, required engagement partner signatures for a number of years.[196]

The Committee notes that in Chapter VII of this Report, the Committee is recommending disclosure of the name(s) of the senior audit partner(s) staffed on the engagement in the proxy statement to increase transparency and affirm the accountability of the auditor.

The Committee believes that the engagement partner's signature on the

Regarding Draft Report and Draft Report Addendum 11, (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtrTreasCmtDraftandAddendum63008.pdf* (acknowledging that litigation issues must be taken into account).

187 See, e.g., Joseph Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP Ernst & Young Professor and Director of Research—Corporate Governance Center University of Tennessee, Jean C. Bedard Timothy B. Harbert Professor of Accountancy Bentley College, Dana R. Hermanson Dinos Eminent Scholar Chair of Private Enterprise and Professor of Accounting Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 6, (May 15, 2008), available at *http://comments.treas.gov/&_files/ACAPCommentLetterMay152008.pdf* (urging the PCAOB to evaluate the efficacy of SAS No. 99); Cynthia Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 26, (June 27, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf* (supporting the Recommendation); Frank Frankowski, CFO, Airborne Systems, Comment Letter Regarding Draft Report and Draft Report Addendum 2, (June 2, 2008), available at *http://comments.treas.gov/_files/FrankowskiLetter.pdf;* Record of Proceedings (June 3, 2008) (Written Submission of Dan Guy, Former Vice President, Professional Standards and Services, American Institute of Certified Public Accountants, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Guy060308.pdf* (recommending the addition of illegal acts to the Recommendation).

188 Donald Chapin, Comment Letter Regarding Draft Report and Draft Report Addendum 1, (June 9, 2008), available at *http://comments.treas.gov/_files/TreasuryAdvisoryCommittee.doc* (supporting the Recommendation).

189 SEC Regulation S–X, Rule 2–02a.

190 Public Company Accounting Oversight Board, Standing Advisory Group Meeting: Auditor's Reporting Model 7–8 (Feb. 16, 2005).

191 See, e.g., Record of Proceedings (Feb. 4, 2008) (Written Submission of Paul G. Haaga, Jr., Vice Chairman, Capital Research and Management Company, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Haaga020408.pdf* (stating that signatures could improve audit quality and enhance accountability).

192 See, e.g., Record of Proceedings (Mar. 13, 2008) (Oral Remarks of Donald T. Nicolaisen, Board Member, Morgan Stanley, 228–230) (stating his belief that engagement partner should sign the auditor's report); Record of Proceedings (Mar. 13, 2008) (Oral Remarks of Mary Bush, Board Member, Discover Financial Services, 231) (endorsing the engagement partner signature on the auditor's report).

193 See, e.g., Donald Chapin, Comment Letter Regarding Draft Report and Draft Report Addendum 2, (June 9, 2008), available at *http://comments.treas.gov/_files/TreasuryAdvisoryCommittee.doc* (suggesting that if the engagement partner and concurring partner sign the auditor's report separately, some type of liability limitations should be received if the firm is not complicit in the audit failure); Dennis Johnson, CFA, Senior Portfolio Manager, CalPERS, Comment Letter Regarding Draft Report and Draft Report Addendum 2, (June 13, 2008), available at *http://comments.treas.gov/_files/200806_13ACAP_addendum_commentltr.pdf* (supporting the Recommendation); Paul Lee, Director, Hermes Equity Ownership Services Limited, Comment Letter Regarding Draft Report and Draft Report Addendum 4, (June 13, 2008), available at *http://comments.treas.gov/_files/ACAPresponse13Jun08.pdf* (noting that the signatures would increase accountability and professionalism).

194 See, e.g., Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 21 (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf* (arguing that regulators and others can already identify those involved in audits); Arnold Hanish, Financial Executives International, Chair, Committee on Corporate Reporting, Comment Letter Regarding Draft Report and Draft Report Addendum 5 (July 3, 2008), available at *http://comments.treas.gov/_files/FEICCRTreasuryACAPCommentLetterFiled73080.pdf* (stating that partners could become excessively conservative and seek multiple opinions from the national office before signing their name); Wayne Kolins, Director of Assurance, BDO Seidman LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 14–15, (June 27, 2008) available at *http://comments.treas.gov/_files/ResponsetoAdvisoryCommittee0627final.PDF* (noting that an audit is a team effort and focusing on one partner may reduce other engagement staff's sense of responsibility); Mayer Hoffman McCann P.C., Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 17, 2008), available at *http://comments.treas.gov/_files/MayerHoffmanMcCannCommentLetter.pdf* (stating that the Recommendation ''may be counterproductive since large audits require many partners in various parts of the country or world''); PricewaterhouseCoopers, Comment Letter Regarding Draft Report and Draft Report Addendum 11–12, (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtrTreasCmtDraftandAddendum63008.pdf* (discerning no clear benefit from the Recommendation).

195 Directive 2006/43/EC of the European Parliament and of the Council Art. 28 (May 17, 2006).

196 The Institute of Chartered Accountants in England and Wales, Shareholder Involvement—Identifying the Audit Partner (2005) (noting that Germany, France, and Luxembourg currently require audit partner signatures and European Member states must adopt such a requirement under Article 28 of the Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts).

auditor's report would increase transparency and accountability. Therefore, the Committee recommends that the PCAOB undertake a standard-setting initiative to consider mandating the engagement partner's signature on the auditor's report. The Committee notes the signature requirement should not impose on any signing partner any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of an auditing firm.[197]

Recommendation 7. Urge the PCAOB to require that, beginning in 2010, larger auditing firms produce a public annual report incorporating (a) information required by the EU's Eighth Directive, Article 40 Transparency Report deemed appropriate by the PCAOB, and (b) such key indicators of audit quality and effectiveness as determined by the PCAOB in accordance with Recommendation 3 in Chapter VI of this Report. Further, encourage the PCAOB to require that, beginning in 2011, the larger auditing firms file with the PCAOB on a confidential basis audited financial statements.

The Committee considered testimony and commentary regarding the transparency of auditing firms.[198] The Committee has reviewed and considered a range of transparency reporting options, including the PCAOB's May 2006 proposal, now finalized, requiring annual and periodic reporting pursuant to the mandate under Sarbanes-Oxley's Section 102(d).[199] This rule requires annual reporting by auditing firms on such items as a public company audit client list and the percentage of the firm's total fees attributable to public company audit clients for each of the following categories of services: audit services, other accounting services, tax services, and non-audit services. The PCAOB rule also requires firms to file a ''special'' report, triggered by such events as the initiation of certain criminal or civil governmental proceedings against the firm or its personnel; a new relationship with a previously disciplined person or entity; or the firm becoming subject to bankruptcy or similar proceedings.

The Committee has also considered the EU's Eighth Directive, Article 40 Transparency Report,[200] which requires that public company auditors post on their websites annual reports including the following information: legal and network structure and ownership description; governance description; most recent quality assurance review; public company audit client list; independence practices and confirmation of independence compliance review; continuing education policy; financial information, including audit fees, tax advisory fees, consulting fees; and partner remuneration policies. The Article 40 Transparency Report also requires a description of the auditing firm's quality control system and a statement by firm management on its effectiveness. Auditing firms and investors have expressed support for requiring U.S. auditing firms to publish reports similar to the Article 40 Transparency Report.[201]

The Committee notes that Recommendation 3 in Chapter VI of this Report recommends that, if feasible, the PCAOB develop audit quality indicators and auditing firms publish these indicators. The Committee believes this information could improve audit quality by enhancing the transparency of auditing firms and notes that some foreign affiliates of U.S. auditing firms provide such indicators in public reports issued in other jurisdictions.[202]

Furthermore, for several years auditing firms in the United Kingdom have published annual reports containing audited financial statements pursuant to limited liability partnership disclosure requirements as well as a discussion of those statements, a statement on corporate governance, performance metrics, and other useful information. In the United States, auditing firms typically do not prepare audited financial statements. Some witnesses have called for the public disclosure of audited financial statements,[203] whereas one auditing firm representative questioned the usefulness of disclosing financial statements of the smaller auditing firms.[204] The Committee received

[197] This language is similar to safe harbor language the SEC promulgated in its rulemaking pursuant to Sarbanes-Oxley's Section 407 for audit committee financial experts. See, SEC, Final Rule: Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release No. 33–8177 (Jan. 23, 2003).

[198] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of James S. Turley, Chairman and Chief Executive Officer, Ernst & Young LLP, 10), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Turley120307.pdf*; Record of Proceedings (Feb. 4, 2008) (Written Submission of Dennis Johnson, Senior Portfolio Manager, Corporate Governance, California Public Employees' Retirement System, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Johnson020408.pdf.*

[199] See PCAOB, Proposed Rules on Periodic Reporting by Registered Public Accounting Firms, available at *http://www.pcaobus.org/rules/docket_019/2006–05–23_release_no._2006–004.pdf.*

[200] Directive 2006/43/EC of the European Parliament and of the Council Art. 40 (May 17, 2006), available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:157:0087:0107:EN:PDF.*

[201] See, e.g., Record of Proceedings (Feb. 4, 2008) (Written Submission of Paul G. Haaga, Jr., Vice Chairman, Capital Research and Management Company, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Haaga020408.pdf* (recommending auditing firm disclosure of quality control policies and procedures); Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, 6), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf* (supporting an annual transparency report for U.S. auditing firms); Record of Proceedings (Written Submission of James S. Turley, Chairman and Chief Executive Officer, Ernst & Young LLP, 10), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Turley120307.pdf* (suggesting the PCAOB require auditing firms to publish transparency reports like the European Union's Article 40 Transparency Report).

[202] See, e.g., Record of Proceedings (Feb. 4, 2008) (Written Submission of Dennis Johnson, Senior Portfolio Manager, Corporate Governance, California Public Employees' Retirement System, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Johnson020408.pdf* (recommending auditing firm disclosure of key performance indicators, such as ''percent of training dollars spent on staff compared to the fees received for the audit, average experience of staff, partner time allocated to each audit'').

[203] See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of John Biggs, Audit Committee Chair, Boeing, Inc., former Chief Executive Officer and Chairman, TIAA–CREF), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Biggs060308.pdf* (stating that audited financial statements would be useful for audit committees); James D. Cox, Duke University, and Lawrence A. Cunningham, George Washington University, Comment Letter Regarding Draft Report and Draft Report Addendum 1–2, (July 4, 2008), available at *http://comments.treas.gov/_files/JointCommentLetteronFACAPJuly2008.doc* (supporting financial statement disclosure for assessing audit quality and independence); Record of Proceedings (Feb. 4, 2008) (Written Submission of Paul G. Haaga, Jr., Vice Chairman, Capital Research and Management Company, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Haaga020408.pdf* (calling for auditing firm disclosure of audited financial statements); Dennis Johnson, CFA, Senior Portfolio Manager, CalPERS, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 13, 2008), available at *http://comments.treas.gov/_files/200806_13ACAP_addendum_commentltr.pdf* (recommending that all audited financial statements be publicly available on the PCAOB's website).

[204] Record of Proceedings (Feb. 4, 2008) (Questions for the Record of Neal Spencer, Managing Partner, BKD LLP, 38–39), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/QFRs-2–4–08.pdf* (analogizing the auditing firm to a vendor and noting that the profitability or financial strength of vendors ''has little, if any, relevance other than perhaps related to concerns about their ability to financially support their continued existence'' and noting that the profitability or financial condition of an auditing firm is not directly related to audit quality; and noting that the ''most relevant financial information for users'' of smaller auditing firms is insurance-related information and noting that larger auditing firms with limited commercial insurance coverage may need to disclose different financial information).

testimony and commentary opposed to the public release of financial statements.[205]

The Committee recommends that the PCAOB require that, beginning in 2010, larger auditing firms (those with 100 or more public company audit clients that the PCAOB inspects annually) produce a public annual report incorporating (a) information required by the Article 40 Transparency Report deemed appropriate by the PCAOB in consultation with investors, other financial statement users, auditing firms, public companies, academics, and other market participants, and (b) such key indicators of audit quality and effectiveness as determined by the PCAOB in accordance with Recommendation 3 in Chapter VII of this Report. These disclosure requirements should supplement any rules approved by the SEC as a result of the PCAOB's May 2006 reporting proposal.

Further, the Committee also recommends that the PCAOB require that, beginning in 2011, the larger auditing firms file with the PCAOB on a confidential basis audited financial statements prepared in accordance with generally accepted accounting principles or international financial reporting standards.

The Committee also recommends that the PCAOB determine which of the requirements included above should be imposed on smaller auditing firms (those with fewer than 100 public company audit clients), taking into account these firms' size and resources.

VI. Concentration and Competition

The Committee analyzed public company audit market concentration and competition. In its work the Committee focused on concentration and competition in the context of their impact on audit quality and effectiveness. In turn, consideration of the sustainability of the auditing profession was also subject to examination in the context of audit quality and effectiveness. The recommendations set out below reflect this focus.

During the course of its deliberations, the Committee received testimony and commentary from the Government Accountability Office (GAO), the Public Company Accounting Oversight Board (PCAOB), academics, auditing firms, investors, and others regarding audit market concentration and competition.

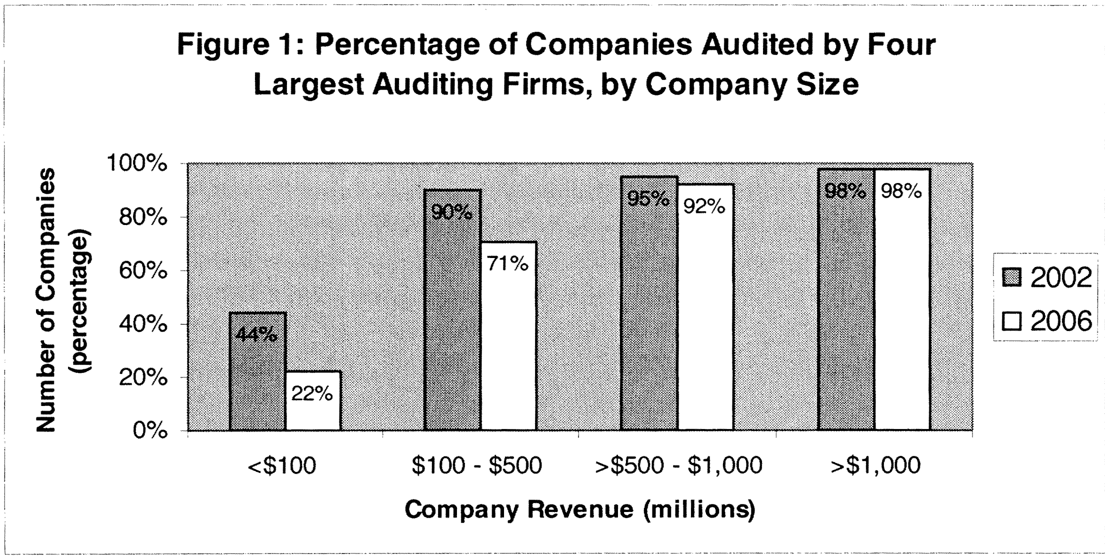
In January 2008, the GAO issued *Audits of Public Companies: Continued Concentration in Audit Market for Large Public Companies Does Not Call for Immediate Action*,[206] updating its 2003 report on audit market concentration.[207] The GAO concluded that the four largest auditing firms continue to dominate the large public company audit market. In 2006, the four largest auditing firms audited 98% of the 1500 largest public companies with annual revenues over $1 billion and 92% of public companies with annual revenues between $500 million and $1 billion. However, concentration in the small and mid-size public company audit market has eased during the past five years. The largest firms' share in auditing small public companies with annual revenues under $100 million has declined from 44% in 2002 to 22% in 2006 and in auditing mid-size public companies with annual revenue between $100 million and $500 million from 90% in 2002 to 71% in 2006.[208] See Figure 1.

[203] See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of John Biggs, Audit Committee Chair, Boeing, Inc., former Chief Executive Officer and Chairman, TIAA–CREF), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Biggs 060308.pdf* (stating that audited financial statements would be useful for audit committees); James D. Cox, Duke University, and Lawrence A. Cunningham, George Washington University, Comment Letter Regarding Draft Report and Draft Report Addendum 1–2, (July 4, 2008), available at *http://comments.treas.gov/_files/JointComment LetteronFACAPJuly2008.doc* (supporting financial statement disclosure for assessing audit quality and independence); Record of Proceedings (Feb. 4, 2008) (Written Submission of Paul G. Haaga, Jr., Vice Chairman, Capital Research and Management Company, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Haaga020408.pdf* (calling for auditing firm disclosure of audited financial statements); Dennis Johnson, CFA, Senior Portfolio Manager, CalPERS, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 13, 2008), available at *http://comments.treas.gov/_files/200806_13ACAP_addendum_commentltr.pdf* (recommending that all audited financial statements be publicly available on the PCAOB's website).

[204] Record of Proceedings (Feb. 4, 2008) (Questions for the Record of Neal Spencer, Managing Partner, BKD LLP, 38–39), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/QFRs-2–4–08.pdf* (analogizing the auditing firm to a vendor and noting that the profitability or financial strength of vendors ''has little, if any, relevance other than perhaps related to concerns about their ability to financially support their continued existence'' and noting that the profitability or financial condition of an auditing firm is not directly related to audit quality; and noting that the ''most relevant financial information for users'' of smaller auditing firms is insurance-related information and noting that larger auditing firms with limited commercial insurance coverage may need to disclose different financial information).

[205] Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 20 (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf* (opposing disclosure of financial statements due to increased litigation risk and the impact on concentration); Record of Proceedings (June 3, 2008) (Written Submission of Charles W. Gerdts, III, General Counsel, PricewaterhouseCoopers, LLP, 12), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard 060308.pdf* (suggesting that audited financial statements would not help audit quality, may harm competition, and could increase settlement awards); Record of Proceedings (June 3, 2008) (Written Submission of Kenneth Nielsen Goldmann, Capital Markets and SEC Practice Director, J.H. Cohn LLP, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Goldmann060308.pdf* (stating that smaller firms would leave the public company audit market due to the fact that ''they would view such disclosure as placing them in a negative competitive position with respect to larger audit firms, current and potential clients, and potential plaintiffs''); David McDonnell, Chief Executive Officer, Grant Thornton International Ltd, and Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Ltd Board of Governors, Comment Letter Regarding Draft Report and Draft Report Addendum 5 (June 27, 2008), available at *http://comments.treas.gov/_files/GTCommentlettertoACAPJune 2008_FINAL.pdf* (noting the lack of evidence that audit quality would improve but states that the Recommendation would have an adverse affect on concentration and smaller firms); Record of Proceedings (June 3, 2008) (Written Submission of Michael R. Young, Partner, Willkie Farr & Gallagher LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Young060308.pdf* (noting that the Recommendation may result in larger settlement demands).

[206] U.S. Government Accountability Office, Audits of Public Companies: Continued Concentration in Audit Market for Large Public Companies Does Not Call for Immediate Action, GAO–08–163 (Jan. 2008) [hereinafter 2008 GAO Report].



Source: U.S. GOVERNMENT ACCOUNTABILITY OFFICE, AUDITS OF PUBLIC COMPANIES: CONTINUED CONCENTRATION IN AUDIT MARKET FOR LARGE PUBLIC COMPANIES DOES NOT CALL FOR IMMEDIATE ACTION, GAO-08-163, Highlights (Jan. 2008).

The Committee considered the testimony of several witnesses regarding the reasons for the continued concentration in the large public company audit market. Auditing firms, public companies, market participants, academics, investors and others reasoned that large public companies with operations in multiple countries need auditing firms with global resources and technical and industry expertise to deal with an increasingly complex business and financial reporting environment.[209] These needs limit auditor choice to only the largest auditing firms for many large public companies. The Committee heard from witnesses who also described barriers to the growth of smaller auditing firms, including the behavior of underwriters and other capital market participants.[210]

In analyzing these data on concentration and limited auditor choice in the large public company audit market, the Committee focused on the potential negative impact of concentration on audit quality. Some have suggested the lack of competition may not provide sufficient incentive for the dominant auditing firms to deliver high quality and innovative audit services.[211] Notwithstanding the increasing number of public company financial restatements,[212] the Committee heard from several witnesses that audit quality had improved.[213] For example, the GAO observed that market participants and public company officials had noted improvement in recent years in audit quality, including auditing firm staff's technical expertise, responsiveness to client needs, and ability to identify material financial reporting matters.[214] Much of the improvement was credited to the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), which enhanced auditor independence, replaced the self-regulation of the auditing profession with the PCAOB, mandated evaluation and disclosure of the effectiveness of internal controls over financial reporting,[215] and strengthened audit committee membership, independence, and responsibilities.

Although industry concentration can lead to increased prices, the Committee notes that the GAO concluded that higher audit market concentration has not been associated with higher fees. Public companies, auditing firms, and other market participants believe the considerable increase in audit fees in recent years is due not to market power of a concentrated industry, but to the increased requirements under Sarbanes-Oxley, the complexity of accounting and financial reporting standards, the need to hire and retain qualified audit staff, and the independence requirements (which have led to the possible re-pricing of audits to their unbundled market price).[216] The Committee also considered the impact of the possible loss of one of the four largest accounting firms in light of the high degree of concentration of public company auditing, and especially large public company auditing, in those firms. The GAO noted the possibility of this loss due to issues arising out of firm conduct, such as civil litigation, federal or state regulatory action or criminal prosecution, or economic events, such as a merger.[217] The GAO posited

[207] GAO, Public Accounting Firms: Mandated Study on Consolidation and Competition, GAO–03–864 (July 2003) (finding that "although audits for large public companies were highly concentrated among the largest accounting firms, the market for audit services appeared competitive according to various indicators").

[208] 2008 GAO Report 19. The GAO also found that the largest firms collected 94% of all audit fees paid by public companies in 2006, slightly less than the 96% they collected in 2002. 2008 GAO Report 16.

[211] 2008 GAO Report 31–32.

[212] See, e.g., Susan Scholz, The Changing Nature and Consequences of Public Company Financial Restatements 1997–2006 (Apr. 2008).

[213] 2008 GAO Report 5; Pub. Company Accounting Oversight Bd., Report on the PCAOB's 2004, 2005, and 2006 Inspections of Domestic Triennially Inspected Firms, PCAOB Rel. No. 2007–010 (Oct. 22, 2007).

[214] Record of Proceedings (Dec. 3, 2007) (Questions for the Record of Jeanette M. Franzel, Director, Financial Management and Assurance Team, U.S. Government Accountability Office, 2 (Jan. 30, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/QFRs-12-3-2007.pdf* (observing that the market believes the "bar had been raised" on audit quality). See also Center for Audit Quality, Report on the Survey of Audit Committee Members (Mar. 2008) (concluding that: 17% of surveyed audit committee members view audit quality as good, 53% as very good, 25% as excellent, while 82% say overall quality has improved somewhat/significantly over the past several years).

[215] 2008 GAO Report 32.

[216] 2008 GAO Report 27–29. On the re-pricing of audits, see also James D. Cox, The Oligopolistic Gatekeeper: The U.S. Accounting Profession, in After Enron: Improving Corporate Law and Modernizing Securities Regulation in Europe and the U.S., Chapter 9, Oxford, forthcoming, available at *http://ssrn.com/abstract=926360.*

[217] 2008 GAO Report 34–35.

potential negative effects of such a loss, including the following: Further limitations on large public company auditor choice, costs associated with changing auditors, and companies' inability to obtain timely financial statement audits.[218] However, the GAO did not recommend insulating auditing firms directly from either the legal or market consequences of their actions.

With the above considerations in mind, the Committee recommends that regulators, the auditing profession, and other bodies, as applicable, effectuate the following:

Recommendation 1. Reduce barriers to the growth of smaller auditing firms consistent with an overall policy goal of promoting audit quality. Because smaller auditing firms are likely to become significant competitors in the market for larger company audits only in the long term, the Committee recognizes that Recommendation 2 will be a higher priority in the near term.

The GAO concluded that concentration in the large public company audit market will not be reduced in the near term by smaller auditing firms. The Committee considered testimony regarding the reasons that smaller auditing firms are unable or unwilling to enter the large public company audit market. Challenges facing these firms' entry into this market typically include the following: Lack of staffing and geographic limitations on both the physical span of their practices and experience and expertise with global auditing complexities; inability to create global networks necessary to serve global clients, due to lack of auditing firms abroad to act as potential partners; the need for greater technical capability and industry specialization; lack of name recognition and reputation; and limited access to capital.[219] In addition, expanding into the large public company audit market may be unattractive for some smaller auditing firms for a variety of reasons,[220] including increased exposure to litigation, the possibility that their business model is not scaleable, and the fact that for some smaller firms other aspects of their business (such as private company auditing and other work) has greater potential for expansion.

To address these issues, the Committee recommends that policy makers press for the reduction of barriers, to the extent consistent with audit quality and other public interest factors, to the growth of smaller auditing firms. For smaller firms, this includes encouraging and promoting development of technical resources in such areas as international financial reporting standards (IFRS) and fair value accounting, and development of specialized or ''niche'' practices or industry ''verticals'' where they are in the best interests of investors and can lead to more effective competition. Pressure also should be applied against non-justifiable resistance to using smaller firms on the part of a variety of market actors.

Some commentary has also noted the costs associated with public companies' changing auditors and how these costs can pose another barrier for smaller firms trying to enter the larger public company audit market. For example, commentary and testimony noted the often high fees charged for the predecessor auditor's opinion on previously filed financial statements and the challenges associated with having the predecessor auditor transfer its work papers to the successor auditor.[221] Other obstacles to auditor changes discussed by the Committee have included poor communication between predecessor and successor auditors.

The Committee believes that public companies should not be limited in their auditor selection by unnecessary barriers created during the auditor change and selection processes. Consistent with AU 315: Communications Between Predecessor and Successor Auditors,[222] which addresses communications between predecessor and successor auditors, the Committee urges the Securities and Exchange Commission (SEC) and the PCAOB to encourage predecessor auditors to fully communicate and cooperate with the successor auditors. This communication and cooperation should apply to all auditors regardless of their size. The issue of auditor changes and the importance of transparency in this area are addressed within Chapter V of this Report.

The Committee believes that the following specific and incremental actions would assist in the growth of the smaller firms and their entry into the large public company audit market:

(a) Require disclosure by public companies in their registration statements, annual reports, and proxy statements of any provisions in agreements with third parties that limit auditor choice.

The Committee considered testimony and commentary that certain market participants, such as underwriters, banks, and lenders, may influence and effectively limit public company auditor selection decisions.[223] For instance, certain contractual arrangements limit public companies' auditor choice.[224] Consistent with the large public company audit market, this practice is particularly prevalent in the initial public offering (IPO) arena, where an underwriter may include in the underwriting agreement a provision limiting the company's auditor choice to a specified group of auditing firms.[225]

[218] 2008 GAO Report 35–36.

[219] See, e.g., 2008 GAO Report 37; Record of Proceedings (Dec. 3, 2007) (Written Submission of Wayne Kolins, National Director of Assurance and Chairman, BDO Seidman LLP, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Kolins120307.pdf* (describing as barriers for smaller auditing firms liability risks, overly complex independence rules, and an array of factors that audit committees may review in choosing an auditor that best matches the company); Record of Proceedings (Feb. 4, 2008) (Written Submission of Neal D. Spencer, Managing Partner, BKD, LLP, 1), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Spencer020408.pdf* (noting that barriers include resources, institutional bias, insurability, and liability).

[220] 2008 GAO Report 38.

[221] Anonymous, Private Investor, Former Auditor, and Former CFO, Comment Letter Regarding Draft Report and Draft Report Addendum 1 (May 11, 2008), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.View&Topic_id=9&FellowType_id=1&CurrentPage=2*; Record of Proceedings (June 3, 2008) (Questions for the Record of Kurt N. Schacht, Managing Director, Centre for Financial Markets Integrity, CFA Institute (June 30, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/QFRs-6-3-08.pdf.*

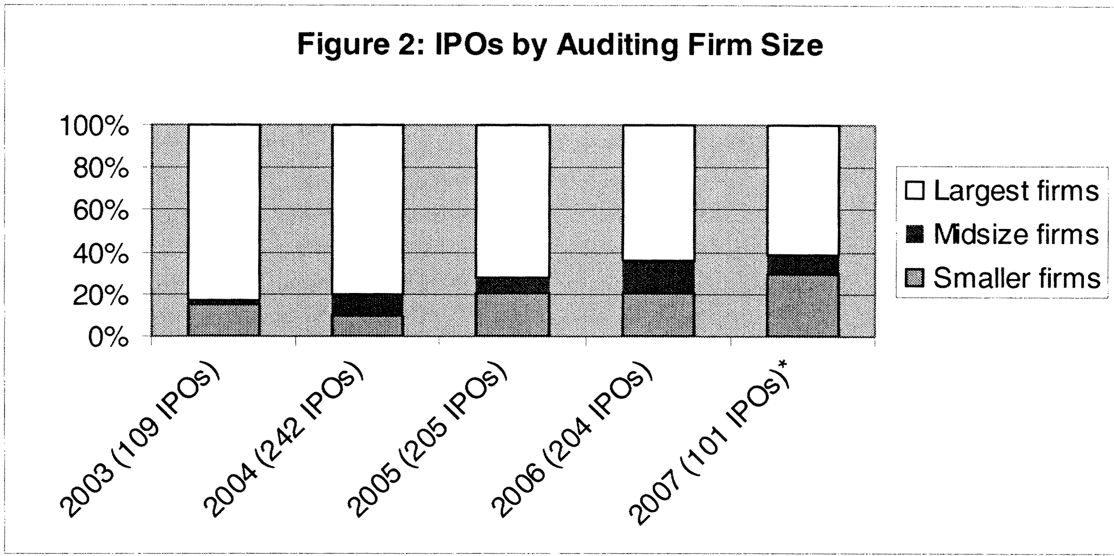
[222] Communications Between Predecessor and Successor Auditors, Interim Auditing Standard AU 315 (Pub. Company Accounting Oversight Bd. 2002).

[223] See, e.g., Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf* (noting that transparency regarding ''restrictive contracts with underwriters'' could improve auditor choice). See also 2008 GAO Report 47.

[224] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of Lewis H. Ferguson, III, Partner, Gibson Dunn & Crutcher, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Ferguson120307.pdf* (''Sometimes lenders, investors, investment bankers or credit rating agencies will insist that a company seeking to access the capital markets have its financial statements audited by one of the largest accounting firms, adding a bias that has the practical effect of being a barrier to entry.'').

[225] See, e.g., Record of Proceedings (May 5, 2008) (Oral Remarks of Committee Member Ken Goldman, Chief Financial Officer, Fortinet, Inc., 143), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-05-05-08.pdf*. See also, Edwin J. Kliegman, CPA, Comment Letter Regarding Discussion Outline 2 (Nov. 26, 2007), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.View&Topic_id=3&FellowType_id=1*; Record of Proceedings (Feb. 4, 2008) (Oral Remarks of Brad Koenig, Former Managing Director and Head of Global Technology Investment Banking, Goldman Sachs, 219–220), available at *http://www.treas.gov/offices/domestic-finance/acap/Koenig020408.pdf* (noting underwriter practices in auditor selection).

Evidence suggests that auditor choice may be more limited among the largest IPOs: While midsize and smaller firms' combined share of the IPO market (by number of IPOs) has increased progressively (rising from 18% in 2003 to 40% in 2007),[226] the largest firms continue to audit the majority of the largest IPOs.[227] See Figure 2.



*IPOs for 2007 are January through June.

Note: The largest firms – Deloitte & Touche LLP, Ernst & Young LLP, KPMG LLP, and PricewaterhouseCoopers LLP – each audited more than 1,200 public companies for 2006 according to Public Accounting Report. The midsize firms – BDO Seidman LLP, Crowe Chizek & Company LLC, Grant Thornton LLP, and McGladrey and Pullen LLP – each audited more than 100 but fewer than 425 public companies for 2006 and had around $1 billion in revenue or less according to Public Accounting Report. Smaller firms include all other auditing firms.

Source: U.S. GOVERNMENT ACCOUNTABILITY OFFICE, AUDITS OF PUBLIC COMPANIES: CONTINUED CONCENTRATION IN AUDIT MARKET FOR LARGE PUBLIC COMPANIES DOES NOT CALL FOR IMMEDIATE ACTION, GAO-08-163, 46 (Jan. 2008).

The Committee believes these provisions impair competition by limiting public company auditor choice and the ability of smaller auditors to serve a greater share of the public company audit market. Accordingly, the Committee recommends that the SEC require public companies to disclose in their registration statements, annual reports, and proxy statements any provisions in agreements limiting auditor choice.[228] The disclosure should identify the agreement and include the names of the parties to the agreement and the actual provisions limiting auditor choice.[229]

(b) Include representatives of smaller auditing firms in committees, public forums, fellowships, and other engagements.

The Committee considered testimony that the lack of smaller firms' name recognition and reputation have hindered smaller auditing firms' ability to compete in the large public company audit market. The GAO noted that name recognition, reputation, and credibility

[226] 2008 GAO Report 44.

[227] Record of Proceedings (Feb. 4, 2008) (Written Submission of Brad Koenig, Former Managing Director and Head of Global Technology Investment Banking, Goldman Sachs, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/Koenig020408.pdf* (noting that from 2002–2007 the largest four auditing firms had an 87% market share of the 817 initial public offerings that exceeded $20 million). See also 2008 GAO Report 44 ("Staff from some investment firms that underwrite stock issuances for public companies told [GAO] that in the past they generally had expected the companies for which they raised capital to use one of the largest firms for IPOs but that now these organizations were more willing to accept smaller audit firms. * * * However, * * * most of the companies that went public with a mid-size or smaller auditor were smaller. In addition, these firms' share of IPOs of larger companies (those with revenues greater than $150 million) rose from none in 2003 to about 13 percent in 2007.").

[228] See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of Jean C. Bedard, Timothy B. Harbert Professor of Accounting, Department of Accountancy, Bentley College, 8), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard060308.pdf* (supporting this Recommendation and noting that enhanced name recognition "would provide further incentives for these [smaller] firms to build the personnel quality of their organizations"); Wayne Kolins, National Director of Assurance and Chairman, BDO Seidman LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 5, (June 27, 2008), available at *http://comments.treas.gov/_files/ResponsetoAdvisoryCommittee0627FINAL.pdf* (recommending that "the SEC adopt a rule prohibiting agreements with third parties that limit auditor selection to specific firms, other than to specify that the firm selected must be suitably qualified to perform the audit"); David McDonnell, Chief Executive Officer, Grant Thornton International Ltd, and Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Ltd Board of Governors, Comment Letter Regarding Draft Report and Draft Report Addendum 6 (June 27, 2008), available at *http://comments.treas.gov/_files/GTCommentlettertoACAPJune2008_FINAL.pdf* ("Such public disclosure will create incentives for audit committees to optimize their auditor choice and help clarify that size alone is not the best criterion when selecting an auditor."). But c.f., Record of Proceedings (June 3, 2008) (Written Submission of Brian O'Malley, Senior Vice President and General Auditor, Nasdaq Stock Market, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/OMalley060308.pdf* (noting that disclosure may add transparency but the "root causes" of decisions to limit auditor choice remain).

[229] The Committee notes that a group of market participants put together by the United Kingdom's Financial Reporting Council to study audit market competition has suggested similar disclosure of contractual obligations limiting auditor choice. See Financial Reporting Council, FRC Update: Choice in the UK Audit Market 4 (Apr. 2007) [hereinafter FRC Update] (recommending that "when explaining auditor selection decisions, Boards should disclose any contractual obligations to appoint certain types of audit firms").

were significant barriers to smaller auditing firm expansion.[230] The PCAOB has registered and oversees 982 U.S. auditing firms and 857 foreign auditing firms.[231] While it is not possible to include all smaller firms, the Committee received testimony and comment letters suggesting that there should be greater inclusion and participation of smaller firms in public and private sector committees, roundtables, and fellowships.[232] One auditing firm representative suggested the creation of a PCAOB professional practice fellowship program, reaching out to professionals from auditing firms of various sizes.[233]

The Committee believes increasing name recognition and reputation could promote audit market competition and auditor choice.[234] Accordingly, the Committee recommends that regulators and policy makers, such as the SEC, the PCAOB, and the Financial Accounting Standards Board (FASB), include representatives of smaller auditing firms in committees, public forums, fellowships, and other engagements.[235] The Committee recognizes the existence of different programs within regulatory agencies available to serve as a resource and contact point for smaller auditing firms and smaller public companies, such as, the SEC's Office of Small Business Policy, the PCAOB's Forum on Auditing in the Small Business Environment, and the FASB's Small Business Advisory Committee.

Recommendation 2. Monitor potential sources of catastrophic risk faced by public company auditing firms and create a mechanism for the preservation and rehabilitation of troubled larger public company auditing firms.

The Committee considered testimony regarding the variety of potentially catastrophic risks that public company auditing firms face. These risks include general financial risks and risks relating to failure in the provision of audit services and non-audit services, including civil litigation, regulatory actions, and loss of customers, employees, or auditing network partners due to a loss of reputation.[236]

The Committee believes these risks are real and notes that over the past two decades two large auditing firms have gone out of existence. In 1990, Laventhol & Horwath, at the time the seventh largest auditing firm in the United States, filed for bankruptcy protection due in part to a failure in the provision of non-audit services, and subsequent class action litigation, loss of reputation, and inability to attract and retain clients.[237] In 2002, Arthur Andersen, at the time one of the five largest auditing firms in the United States, dissolved. The Department of Justice (DOJ) had criminally indicted the auditing firm on obstruction of justice charges relating to the audit of Enron. The resulting inability to retain clients and partners and keep together its global affiliate network led to the collapse of Arthur Andersen.[238]

In addition, KPMG recently faced the possibility of criminal indictment relating to its provision of tax-related services. In the end, KPMG entered into a deferred prosecution agreement with the DOJ.[239] Many have suggested that a criminal indictment would have led to the dissolution of the firm.

Currently, BDO Seidman is appealing a $521 million state judgment involving a private company audit client. The auditing firm's chief executive has publicly stated that such a judgment amount would threaten the firm's viability.[240]

As discussed above, the Committee believes that the loss of one of the larger auditing firms would likely have a significant negative impact on the capital markets. Of greatest concern is the potential disruption to capital markets that the failure of a large auditing firm would cause, due to the lack of sufficient capacity to audit the largest public companies and the possible inability of public companies to obtain timely audits.[241] The

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[230] 2008 GAO REPORT 44 (''Fifty percent of accounting firms responding to [GAO's] survey that want to audit large companies said that name recognition or reputation with potential clients was a great or very great impediment to expansion. Similarly, 54 percent of these firms cited name recognition or credibility with financial markets and investment bankers as a great or very great impediment to expansion.''). See also Edward J. Kliegman, CPA, Comment Letter Regarding Discussion Outline (Nov. 16, 2007), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.View&Topic_id=3&FellowType_id=1.*

[231] Data are as of Feb. 21, 2008.

[232] See, e.g., Andrew D. Bailey, Jr., Professor of Accountancy—Emeritus, University of Illinois, and Senior Policy Advisor, Grant Thornton LLP, Comment Letter Regarding Discussion Outline 16 (Jan. 30, 2008), available at *http://comments.treas.gov/_files/BAILEYCOMMENTSONTREASURYADVISORYCOMMITTEEOUTLINEFINALSUBMISSION13008.doc;* Record of Proceedings (Dec. 3, 2007) (Questions for the Record of James S. Turley, Chairman and Chief Executive Officer, Ernst & Young LLP, 4 (Feb. 1, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/QFRs-12-3-2007.pdf.*

[233] Record of Proceedings (Dec. 3, 2007) (Written Submission of Wayne Kolins, National Director of Assurance and Chairman, BDO Seidman LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Kolins120307.pdf.* See Chapter IV (recommending the creation of a PCAOB fellowship program). While maintenance and extension of professional fellowship programs are also considered in the Committee's recommendations relating to human capital matters, extending these opportunities increasingly to firms of various sizes could assist smaller firms in their ability to compete in the public company audit market.

[234] See, e.g. Record of Proceedings (June 3, 2008) (Written Submission of Jean C. Bedard, Timothy B. Harbert Professor of Accounting, Department of Accountancy, Bentley College, 8), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard060308.pdf* (agreeing with the Recommendation); Record of Proceedings (June 3, 2008) (Written Submission of Kenneth Nielsen Goldmann, Capital Markets and SEC Practice Director, J.H. Cohn LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Goldmann060308.pdf* (''More opportunities such as this testimony for leaders of smaller firms to participate in important public policy discussions about the public company audit profession would over time enhance public understanding and acceptance that high quality in auditing is achievable in different forms and packages.''); Record of Proceedings (June 3, 2008) (Written Submission of Kurt N. Schacht, Managing Director, Centre for Financial Market Integrity, CFA Institute, 2–3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Schacht060308.pdf.*

[235] For a similar recommendation, see SEC Advisory Committee on Smaller Public Companies, Final Report 114 (Apr. 23, 2006).

[236] See, e.g., 2008 GAO Report 32–36; Zoe-Vonna Palmrose, Maintaining the Value and Viability of Independent Auditors as Gatekeepers under SOX: An Auditing Master Proposal, in Brookings-Nomura Seminar: After the Horses Have Left the Barn: the Future Role of Financial Gatekeepers 12–13 (Sept. 28, 2005). Civil litigation was the risk most often cited by witnesses before the Committee. See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of James D. Cox, Brainerd Currie Professor of Law, Duke University School of Law), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Cox120307.pdf.* See also Eric R. Talley, Cataclysmic Liability Risk among Big Four Auditors, 106 Colum. L. Rev. 1641 (Nov. 2006) (''On one hand, the pattern of liability exposure during the last decade does not appear to be the type that would, at least on first blush, imperil the entire profession. On the other hand, if one predicts historical liability exposure patterns into the future, the risk of another firm exiting due to liability concerns appears to be more than trivial.'').

[237] See, e.g, 2008 GAO Report 33.

[238] See, e.g., U.S. Government Accountability Office, Public Accounting Firms: Mandated Study on Consolidation and Competition 12 (July 2003) (''The criminal indictment of fourth-ranked Andersen for obstruction of justice stemming from its role as auditor of Enron Corporation led to a mass exodus of Andersen partners and staff as well as clients.'').

[239] 2008 GAO Report 56–57, n. 60. Note that the Department of Justice did indict several individuals.

[240] Jury Awards Rise Against BDO Seidman, Assoc. Press, Aug. 15, 2007.

[241] See 2008 GAO Report 35, 36 (observing that further audit market concentration would ''leave large companies with potentially only one or two choices for a new auditor'' and that ''the market disruption caused by a firm failure or exit from the market could affect companies' abilities to obtain timely audits of their financial statements, reducing the audited financial information available to investors''). See also London Economics, Final Report to EC–DG Internal Market and Services, Study on the Economic Impact of Auditors' Liability Regimes 24 (Sept. 2006) (''The adjustment to a situation in which one of the Big-4 networks fails is unlikely to be smooth. But the long run consequences are likely to be limited provided the overall statutory audit capacity does not fall

Committee believes these concerns must be balanced against the importance of auditing firms and their partners, as private, for-profit businesses, being exposed to the consequences of failure, including both the legal consequences and economic consequences.

In consideration of these competing concerns, the Committee makes the following recommendations:

(a) As part of its current oversight over registered auditing firms, the PCAOB should monitor potential sources of catastrophic risk which would threaten audit quality.

The PCAOB's mission is to oversee auditing firms conducting audits of public companies. Its audit quality-focused mission is intertwined with issues of catastrophic risk, as most often risks to firms' survival historically have been largely the result of significant audit quality failures or serious compliance issues in the non-audit services aspect of their business.

Sarbanes-Oxley provides the PCAOB with registration, reporting, inspection, standard-setting, and enforcement authority over public company auditing firms.[242] Under its inspection authority, the PCAOB inspects audit engagements, evaluates quality control systems, and tests as necessary audit, supervisory, and quality control procedures. For example, in its inspection of an auditing firm's quality control systems, the PCAOB reviews the firm's policies and procedures related to partner evaluation, partner compensation, new partner nominations and admissions, assignment of responsibilities, disciplinary actions, and partner terminations; compliance with independence requirements; client acceptance and retention policies and procedures; compliance with professional requirements regarding consultations on accounting, auditing, and SEC matters; internal inspection program; processes for establishing and communicating audit policies, procedures, and methodologies; processes related to review of a firm's foreign affiliate's audit performance; and tone at the top.[243]

The PCAOB also has authority to require registered auditing firms to provide annual and periodic reports. In May 2006, the PCAOB issued Proposed Rules on Periodic Reporting by Registered Public Accounting Firms requiring annual and periodic reporting.[244] The PCAOB has not yet finalized this proposal.

The Committee therefore recommends that the PCAOB, in furtherance of its objective to enhance audit quality and effectiveness, exercise its authority to monitor meaningful sources of catastrophic risk that potentially impact audit quality through its programs, including inspections, registration and reporting, or other programs, as appropriate.[245] The objective of PCAOB monitoring would be to alert the PCAOB to situations in which auditing firm conduct is resulting in increased catastrophic risk which is impairing or threatens to impair audit quality.[246]

(b) Establish a mechanism to assist in the preservation and rehabilitation of a troubled larger auditing firm. A first step would encourage larger auditing firms to adopt voluntarily a contingent streamlined internal governance mechanism that could be triggered in the event of threatening circumstances. If the governance mechanism failed to stabilize the firm, a second step would permit the SEC to appoint a court-approved trustee to seek to preserve and rehabilitate the firm by addressing the threatening situation, including through a reorganization, or if such a step were unsuccessful, to pursue an orderly transition.

The Committee considered testimony regarding the importance of the viability of the larger auditing firms and the negative consequences of the loss of one of these firms on the capital markets. The Committee also considered commentary regarding issues auditing firms faced in addressing circumstances that threatened their viability, including, in particular, problems arising from the need to work with regulators and law enforcement agencies.[247] Several witnesses suggested the development of a mechanism to allow auditing firms facing threatening circumstances to emerge from those situations.[248] Committee member and former Federal Reserve Chairman Paul Volcker opined that, ''[I]f we had [such an] arrangement at the time Andersen went down, we would have saved it.''[249] The Committee notes that it is critical to have a process in place to quickly respond to crisis events and

significantly. Among the various economic sectors, financial institutions may find such a situation particularly difficult as their statutory audits are viewed as more risky and * * * two Big-4 firms dominate the market for statutory audits of financial institutions. The situation is likely to be much direr if a second Big-4 network fails shortly after the first one. Investors' confidence will be in all likelihood seriously affected and the adjustment to the new situation is likely to be difficult.'').

[242] Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7211–7219.

[243] See, e.g., PCAOB, Observations on the Initial Implementation of the Process for Addressing Quality Control Criticisms within 12 Months after an Inspection Report, PCAOB Release No. 104–2006–078 (Mar. 21, 2006). See also the PCAOB's completed inspection reports at *http://www.pcaobus.org/Inspections/Public_Reports/index.aspx#k*.

[244] PCAOB Release No. 2006–004 (May 23, 2006).

[245] See, *e.g.*, Record of Proceedings (June 3, 2008) (Oral Remarks of James Kaplan, Chairman and Founder, Audit Integrity, 280–283), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-06–03–08.pdf* (noting that ''it really only requires one or two catastrophic events in order to upset or disturb the market place. And clearly, more information needs to be gathered and collected to ensure, or at least assure, that the number of tragic incidents like that are minimized and mitigated''); Record of Proceedings (June 3, 2008) (Written Submission of Brian O'Malley, Senior Vice President and General Auditor, Nasdaq Stock Market, 2–3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/OMalley060308.pdf* (supporting this Recommendation); Record of Proceedings (June 3, 2008) (Written Submission of Kurt N. Schacht, Managing Director, Centre for Financial Market Integrity, CFA Institute, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Schacht060308.pdf* (supporting this Recommendation).

[246] See, *e.g.*, Record of Proceedings (June 3, 2008) (Written Submission of Jean C. Bedard, Timothy B. Harbert Professor of Accounting, Department of Accountancy, Bentley College, 9), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard060308.pdf* (supporting this Recommendation); Record of Proceedings (June 3, 2008) (Written Submission of Charles W. Gerdts, III, General Counsel, PricewaterhouseCoopers, LLP, 8), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard060308.pdf* (stating that the ''concept'' behind this Recommendation deserves serious consideration).

[247] See, e.g., Securities and Exchange Commission, Temporary Final Rule and Final Rule: Requirements for Arthur Andersen LLP Auditing Clients, SEC Release No. 33–8070 (Mar. 18, 2002); Securities and Exchange Commission, Press Rel. No. 2002–39 and Order Rel. No. 33–8070 (Mar. 18, 2002) (indictment of Arthur Andersen); SEC Staff Accounting Bulletin No. 90 (Feb. 7, 1991) (bankruptcy of Laventhol & Horwath).

[248] Record of Proceedings (Dec. 3, 2007) (Written Submission of James R. Doty, Partner, Baker Botts L.L.P., 11–13), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Doty120307.pdf* (suggesting that the Bankruptcy Code be amended to prevent creditors whose claims relate to violations of professional standards from opposing reorganization under a court-approved plan; an automatic stay against partners facilitating partner retention; expanding the SEC's emergency powers to enable the SEC to act by summary order to address the registered firm's ability to continue to provide audit services; and encouraging the SEC or PCAOB to discourage ''client poaching'' by requiring public companies to show that switching auditors was not related to mega-judgments against audit affiliates in other jurisdictions). See also Record of Proceedings (Dec. 3, 2007) (Written Submission of Peter S. Christie, Principal, Friemann Christie, LLC, 6), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Christie120307.pdf* (''If it remains possible that a firm can fail for reasons other than liability claims it may be attention needs to be given to devices that will permit a firm to re-emerge.'').

[249] Record of Proceedings (Mar. 13, 2008) (Oral Remarks of Paul A. Volcker, Former Chairman, Board of Governors, Federal Reserve System, 317), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/minutes-03–13–08.pdf.*

recommends the following two-step mechanism described below.

First Step—Internal Governance Mechanism

The Committee notes that auditing firms operate as partnerships, generally led by a centralized management team, with a supervisory board of partners overseeing management's strategy and performance.[250] In the event of threatening circumstances at a larger auditing firm, the Committee believes that a lack of effective centralized governance mechanisms may delay crucial decision making, impede difficult decisions that could sustain the firm and its human assets, and lessen the firm's ability to communicate with maximum responsiveness and effectiveness with private, regulatory and judicial bodies.

The Committee therefore recommends that larger auditing firms (those with 100 or more public company audit clients that the PCAOB inspects annually) establish in their partnership agreements a contingent internal governance mechanism, involving the creation of an Executive Committee (made up of partners or outsiders) with centralized firm management powers to address threatening circumstances. The centralized governance mechanism would have full authority to negotiate with regulators, creditors, and others, and it would seek to hold the firm's organization intact, including preserving the firm's reputation, until the mitigation of the threat, or, failing that, the implementation of the second step outlined below. The auditing firm voluntarily would trigger the operation of this mechanism upon the occurrence of potentially catastrophic events specified in the partnership agreement, such as civil litigation or actual or significantly threatened government or regulatory action. If necessary, the SEC and the PCAOB could encourage the firm to trigger the mechanism through private communications, public statements, or other means. Regulators could also assist in maintaining the firm's organization intact by, for example, increasing the time period for registrants that are audit clients to have audits or reviews completed and providing accelerated consultative guidance to registrants that are audit clients.[251] The Committee recognizes the precise details of such a mechanism would vary from auditing firm to auditing firm, depending on firm structures, history, and culture.[252]

Second Step—External Preservation Mechanism

The Committee also recommends that the larger auditing firms establish in their partnership agreements a rehabilitation mechanism under SEC oversight. The failure of the internal governance mechanism to preserve the auditing firm outlined in the first step above would trigger this second step, which would require legislation. Upon triggering of the second step, either voluntarily by the firm or by the SEC, the SEC would appoint a trustee, subject to court approval, whose mandate would be to seek to address the circumstances that threaten survival, and failing that, to pursue a reorganization that preserves and rehabilitates the firm to the extent practicable, and finally, if reorganization fails, to pursue an orderly transition.[253] If this second mechanism is to include an element that addresses claims of creditors (which could include investors with claims, audit and other clients, partners, other employees, and others), legislation to integrate this mechanism with the judicial bankruptcy process may be necessary.

It is important that this mechanism not be used as insurance for partner capital; that is, this mechanism should not be developed to ''bail out'' a larger auditing firm, but rather to preserve and rehabilitate the firm in order to ensure the stable functioning of the capital markets and the timely delivery of audited financial statements to investors and other financial statement users. Accordingly, there must be powers that can be exercised in furtherance of the objective of holding the firm together.[254]

In addition, the Committee recommends that, in order for the SEC to make effective and timely use of its powers under this Recommendation and for the DOJ to have the opportunity to be informed as to the consequences that would result from a potential charging decision against a public auditing firm (as distinct from individuals within a firm), the DOJ should inform the SEC prior to bringing criminal charges against such a firm.

The Committee also notes that the larger auditing firms are members or affiliates of global networks of firms and rely on these networks to serve their global clients. Since the networks are maintained through voluntary contractual agreements, the fact that a U.S.-based firm may be facing threatening circumstances could lead to the disintegration of the network. In this regard, in developing this mechanism, auditing firms, regulators, policy makers, and other market participants must consider the practical implications resulting from the relationship between the U.S.-based firms and the global networks.

Recommendation 3. Recommend the PCAOB, in consultation with auditors, investors, public companies, audit committees, boards of directors, academics, and others, determine the feasibility of developing key indicators of audit quality and effectiveness and requiring auditing firms to publicly disclose these indicators. Assuming development and disclosure of indicators of audit quality are feasible,

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[250] Center for Audit Quality, Report of the Major Public Company Audit Firms to the Department of the Treasury Advisory Committee on the Auditing Profession 13 (Jan. 23, 2008).

[251] See, e.g., Securities and Exchange Commission, Temporary Final Rule and Final Rule: Requirements for Arthur Andersen LLP Auditing Clients, SEC Release No. 33–8070 (Mar. 18, 2002); Securities and Exchange Commission, Press Rel. No. 2002–39 and Order Rel. No. 33–8070 (Mar. 18, 2002) (indictment of Arthur Andersen); SEC Staff Accounting Bulletin No. 90 (Feb. 7, 1991) (bankruptcy of Laventhol & Horwath).

[252] Note that some commenters sought more prescription surrounding the implementation of this mechanism. See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of Jean C. Bedard, Timothy B. Harbert Professor of Accounting, Department of Accountancy, Bentley College, 9), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard060308.pdf* (recommending that the SEC and/or the PCAOB be granted the power to ''require a firm to invoke its internal governance mechanism or to directly invoke the external preservation mechanism when particularly severe threats arise''); Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 27–29 (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf* (stating that ''the only effective way to stave off disaster is to ensure that the threat itself is mitigated at its source''); Cynthia Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 34–35 (June 27, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf*; Record of Proceedings (June 3, 2008) (Written Submission of Barry Mathews, Deputy Chairman, Aon Corporation, 1), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Mathews060308.pdf.*

[253] Some witnesses questioned whether the SEC would be willing to assume such a role. See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of Charles W. Gerdts, III, General Counsel, PricewaterhouseCoopers, LLP, 9), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Gerdts060308.pdf* (noting that the SEC may not have the resources, expertise, or will to assume such a role).

[254] Record of Proceedings (Dec. 3, 2007) (Written Submission of James R. Doty, Partner, Baker Botts L.L.P., 11), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Doty120307.pdf* (Dec. 3, 2007) (''It is an anecdotal but firmly held perception of the profession that no accounting firm has entered bankruptcy and emerged to continue its practice. The hard assets of the firm are not significant: the professionals and the clients are the lifeblood of the registered firm. With any anticipation of bankruptcy, these mobile assets are gone.'').

require the PCAOB to monitor these indicators.

A key issue in the public company audit market is what drives competition for audit clients and whether audit quality is the most significant driver. Currently, there is minimal publicly available information regarding indicators of audit quality at individual auditing firms. Consequently, it is difficult to determine whether audit committees, who ultimately select the auditor, and management are focused and have the tools that are useful in assessing audit quality that would contribute to making the initial auditor selection and subsequent auditor retention evaluation processes more informed and meaningful.[255] In addition, with the majority of public companies currently putting shareholder ratification of auditor selection to an annual vote, shareholders may also lack audit quality information important in making such a ratification decision.[256]

The Committee believes that requiring firms to disclose indicators of audit quality may enhance not only the quality of audits provided by such firms, but also the ability of smaller auditing firms to compete with larger auditing firms, auditor choice, shareholder decision-making related to ratification of auditor selection, and PCAOB oversight of registered auditing firms.

The Committee recognizes the challenges of developing and monitoring indicators of audit quality, especially in light of the complex factors driving the potential impact on the incentives of market actors, and the resulting effect on competitive dynamics among auditors.[257]

The Committee has considered testimony and comment letters as well as other studies and reports in developing this recommendation. A possible framework for PCAOB consideration is reviewing annual auditing firm reports in other jurisdictions. For example, one auditing firm's United Kingdom affiliate lists in its annual report nine ''key performance indicators, including average headcount, staff turnover, diversity, client satisfaction, audit and non-audit work, proposal win rate, revenue, profit, and profit per partner.'' [258] The Financial Reporting Council recently published a paper setting out drivers of audit quality.[259] In addition, the PCAOB also could consider some of the factors that auditing firms present to audit committees, such as engagement team composition, the nature and extent of firm training programs, and the nature and reason for client restatements.[260]

The Committee therefore recommends that the PCAOB, in consultation with auditors, investors, public companies, audit committees, boards of directors, academics, and others, determine the feasibility of developing key indicators of audit quality and requiring auditing firms to publicly disclose these indicators.[261] Testimonies and comment letters have suggested specific output-based audit quality indicators—indicators determined by what the auditing firm has produced in terms of its audit work, such as number of frauds discovered and nature and reason for financial restatements related to time periods when the underlying reason for restatement occurred during the auditing firm's tenure as auditor for the client- and input-based audit quality indicators—indicators of what the auditing firm puts into its audit work to achieve a certain result, such as the auditing firm's processes and procedures used for detecting fraud, the average experience level of auditing firm staff on individual engagements, the average ratio of auditing firm professional staff to auditing firm partners on individual engagements, and annual staff retention.[262] The Committee believes that the PCAOB should consider both output-based and input-based indicators.[263] The

[255] See, e.g., New York Stock Exchange, Listed Company Manual § 303A, which the SEC approved on November 4, 2003, for the responsibilities of exchange-listed companies' audit committees.

[256] Institutional Shareholder Services, U.S. Corporate Governance Policy—2007 Updates 3 (2006).

[257] If the idea proves to be workable, implementation could be a major undertaking for the PCAOB. Developing meaningful quality indicators, defining how they should be measured, and rolling out the measurement process could take significant PCAOB time and effort. Auditing firms, public companies, investors, and academics would all likely have valuable ideas as to approaches the PCAOB could take. However the indicators were devised, firms would have to build their internal processes for measuring the audit quality indicators and the PCAOB would have to develop procedures and training to monitor those processes.

[258] See KPMG LLP, UK Annual Report 2007 46.

[259] FRC Update 4.

[260] Record of Proceedings (Dec. 3, 2007) (Written Submission of Wayne Kolins, National Director of Assurance and Chairman, BDO Seidman LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Kolins120307.pdf.*

[261] See, e.g., Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 29, (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf;* Ernst & Young LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 33–34, (June 27, 2008), available at *http://comments.treas.gov/_files/EYACAPCommentLetterFINAL.pdf;* Cynthia Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 36–38, (June 27, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf* (noting that the feasibility study should state the overarching objectives of quality indicators, consider the differences in firm size, partnership model, audit practice scope and audit specialty, and recognize the costs, difficulty and complexity involved); Record of Proceedings (June 3, 2008) (Written Submission of Kenneth Nielsen Goldmann, Capital Markets and SEC Practice Director, J.H. Cohn LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Goldmann060308.pdf.*

[262] See, e.g., Anonymous Retired Big 4 partner, Comment Letter Regarding Discussion Outline (Nov. 2007) (recommending public disclosure of the following audit quality drivers: (1) Average years of experience of audit professionals, (2) ratio of professional staff to audit partners, (3) chargeable hours per audit professional, (4) professional chargeable hours managed per audit partner, (5) annual professional staff retention, and (6) average annual training hours per audit professional); Matthew J. Barrett, Professor of Law, Notre Dame Law School, Comment Letter Regarding Draft Report and Draft Report Addendum (June 13, 2008), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.View&Topic&_id=9&FellowType&_id=1&CurrentPage=1;* Dennis Johnson, CFA, Senior Portfolio Manager, CalPERS, Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 13, 2008), available at *http://comments.treas.gov/_files/200806_13ACAP_addendum_commentltr.pdf* (suggesting to include, among other things, ''average headcount, staff turnover, diversity, client satisfaction, audit and non-audit work, proposal win rate, revenue, profit, profit per partner, engagement team composition, the nature and extent of training programs and the nature and reason for client restatements''); Record of Proceedings (Dec. 3, 2007) (Written Submission of Wayne Kolins, National Director of Assurance and Chairman, BDO Seidman LLP, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Kolins120307.pdf* (recommending the issuance of regulatory guidance on qualitative factors to be used by audit committees and other market participants to evaluate auditing firms); Record of Proceedings (Dec. 3, 2007) (Written Submission of Dennis M. Nally, Chairman and Senior Partner, PricewaterhouseCoopers LLP, 6), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Nally120307.pdf* (suggesting that disclosure of ''key elements that drive audit quality would be a useful benefit to the capital markets'' and could include ''firm disclosure and discussion of the levels of partner and staff turnover, average hours of professional training, risk management and compliance measurements, and metrics related to the quality of management and firm governance processes''); Anonymous Private Investor, Former Auditor, and Former CFO, Comment Letter Regarding Draft Report and Draft Report Addendum (May 11, 2008), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.View&Topic&_id=9&FellowType&_id=1&CurrentPage=2* (recommending that the auditor's report disclose, in addition to the location of the office conducting the audit, the percentage of office revenue attributed to the client, the length of the audit firm's tenure with the client, and the length of time until the lead and concurring partner must rotate).

[263] See, e.g., Matthew J. Barrett, Professor of Law, Notre Dame Law School, Comment Letter Regarding Draft Report and Draft Report Addendum (June 13, 2008), available at *http://comments.treas.gov/index.cfm?FuseAction=Home.View&Topic_id=9&FellowType_id=1&CurrentPage=1* (suggesting that the SEC require registrants to publicly disclose any financial fraud uncovered by the auditor, including numbers and amount of all audit adjustments, and the number of restatements of financial statements

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Committee also recommends that, if the proposal is feasible, the PCAOB, through its inspection process, should monitor these indicators.

Recommendation 4. Promote the understanding of and compliance with auditor independence requirements among auditors, investors, public companies, audit committees, and boards of directors, in order to enhance investor confidence in the quality of audit processes and audits.

The Committee considered testimony and comment letters regarding the significance of the independence of the public company auditor—both in fact and appearance—to the credibility of financial reporting, investor protection, and the capital formation process.[264] The auditor is expected to offer critical and objective judgment on the financial matters under consideration, and actual and perceived absence of conflicts is critical to that expectation.

The Committee believes that auditors, investors, public companies, and other market participants must understand the independence requirements and their objectives, and that auditors must adopt a mindset of skepticism when facing situations that may compromise their independence. In that regard, the Committee makes the following recommendations:

(a) Compile the SEC and PCAOB independence requirements into a single document and make this document website accessible. The American Institute of Certified Public Accountants (AICPA) and state boards of accountancy should clarify and prominently note that differences exist between the SEC and PCAOB standards (applicable to public companies) and the AICPA and state standards (applicable in all circumstances, but subject to SEC and PCAOB standards, in the case of public companies) and indicate, at each place in their standards where differences exist, that stricter SEC and PCAOB independence requirements applicable to public company auditors may supersede or supplement the stated requirements. This compilation should not require rulemaking by either the SEC or the PCAOB because it only calls for assembly and compilation of existing rules.

In the United States, various oversight bodies have authority to promulgate independence requirements, including the SEC and PCAOB for public company auditors, and the AICPA and state boards of accountancy for public and private company auditors.[265] The Committee recommends that the SEC and PCAOB compile and publish their independence requirements in a single document and make this document easily accessible on their websites.[266] The Committee recommends that the AICPA and state boards of accountancy clarify and prominently state that differences exist between their standards and those of the SEC and the PCAOB and indicate, at each place in their standards where differences exist, that additional SEC and PCAOB independence requirements applicable to public company auditors may supersede or supplement the stated requirements.[267]

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with unqualified opinions); Joseph V. Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP Ernst & Young Professor and Director of Research—Corporate Governance Center University of Tennessee, Jean C. Bedard Timothy B. Harbert Professor of Accountancy Bentley College, Dana R. Hermanson Dinos Eminent Scholar Chair of Private Enterprise and Professor of Accounting Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 10 (May 15, 2008), available at *http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf* (suggesting that the Committee consider ''output-based measures of audit quality'' such as fewer client frauds, fewer client restatements, less earnings management, and more accurate auditor reporting before a bankruptcy filing); Record of Proceedings (Dec. 3, 2007) (Written Submission of Wayne Kolins, National Director of Assurance and Chairman, BDO Seidman LLP, 2), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Kolins120307.pdf;* Gilbert F. Viets, Comment Letter Regarding Draft Report and Draft Report Addendum 2–3, (May 19, 2008), available at *http://comments.treas.gov/_files/TREASURYLETTER3.doc* (suggesting disclosure of instances where the auditor found and corrected, prior to their disclosure, material financial statement errors and the firms' ''acceptable audit risk'' in discovering material errors). The Committee recognizes the concerns noted by certain testimony and commentary regarding the use of audit quality indicators. See, e.g., Cynthia M. Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 37 (June 27, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf* (''Any feasibility study should also consider—as the [UK's Financial Reporting Council] has recognized—how the key indicators being considered may vary due to factors unrelated to audit quality.''); Wayne Kolins, National Director of Assurance and Chairman, BDO Seidman, LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 11 (June 27, 2008), available at *http://comments.treas.gov/_files/ResponsetoAdvisoryCommittee0627final.PDF* (''Disclosure of indicators would only be meaningful if they have a clear and demonstrable relationship to audit quality and, even if they do, only if they can be understood in the context of a particular audit.''); Record of Proceedings (June 3, 2008) (Written Submission of Brian O'Malley, Senior Vice President and General Auditor, Nasdaq Stock Market, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/OMalley060308.pdf* (cautioning against an auditing industry managing itself towards some set of preconceived metrics that might sway them from investor protection).

[264] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of Dennis M. Nally, Chairman and Senior Partner, PricewaterhouseCoopers LLP, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Nally120307.pdf* (''Independence forms the bedrock of credibility in the auditing profession, and is essential to the firms' primary function in the capital markets.''); Record of Proceedings (Feb. 4, 2008) (Written Submission of Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Board of Governors, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Nusbaum020408.pdf.*

[265] See, e.g., SEC Regulation S–X, Article 2, Rule 2–01—Qualifications of Accountants, 17 CFR § 210.2–01; SEC Financial Reporting Policies, Sec. 602.01—Interpretations Relating to Independence; SEC Final Rule, Amendments to SEC Auditor Independence Requirements ''Strengthening the Commission's Requirements Regarding Auditor Independence'', SEC Rel. No 33–8183 (2003); SEC Final Rule, Revision of the Commission's Auditor Independence Requirements, SEC Rel. No. 33–7919 (2001); PCAOB, Interim Independence Standards, ET Sections 101 and 191; Independence Standards Board, Independence Standards Nos. 1, 2, and 3, and ISB Interpretations 99–01, 00–1, and 00–2; PCAOB Bylaws and Rules, Section 3, Professional Standards; AICPA Code of Professional Conduct, ET Sections 100–102.

[266] See, e.g., Cynthia Fornelli, Executive Director, Center for Audit Quality, Comment Letter Regarding Draft Report and Draft Report Addendum 38–39, (June 26, 2008), available at *http://comments.treas.gov/_files/CAQCommentletter62708FINAL.pdf* (agreeing that ''such a document would make it easier for auditors to understand the independence requirements that apply to them''); Record of Proceedings (June 3, 2008) (Written Submission of Brian O'Malley, Senior Vice President and General Auditor, Nasdaq Stock Market, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/OMalley060308.pdf* (stating that the Recommendation would be a ''great asset''); PricewaterhouseCoopers, Comment Letter Regarding Draft Report and Draft Report Addendum 19, (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtrTreasCmtDraftandAddendum63008.pdf* (supporting this Recommendation). Note that the Committee received testimony and comment letters suggesting that the Department of Labor independence rules be included in this compilation. See, e.g. Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 30, (June 27, 2008), available at *http://comments.treas.gov/_files/DeloitteLLPCommentLetter.pdf;* Record of Proceedings (June 3, 2008) (Written Submission of Kenneth Nielsen Goldmann, Capital Markets and SEC Practice Director, J.H. Cohn LLP, 7), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Goldmann060308.pdf. (recommending* the inclusion of the Department of Labor and others in the Recommendation); Mayer Hoffman McCann P.C., Comment Letter Regarding Draft Report and Draft Report Addendum 5, (June 17, 2008), available at *http://comments.treas.gov/_files/MayerHoffmanMcCannCommentLetter.pdf* (suggesting the Recommendation include the SEC, PCAOB, AICPA, DOL, and GAO).

[267] The Committee took note of concerns expressed regarding independence issues from a variety of perspectives. See, e.g., Andrew D. Bailey, Jr., Professor of Accountancy—Emeritus, University of Illinois, and Senior Policy Advisor, Grant Thornton LLP, Comment Letter Regarding Discussion Outline 9 (Jan. 30, 2008), available at *http://comments.treas.gov/_files/BAILEYCOMMENTSONTREASURYADVISORYCOMMITTEEOUTLINEFINALSUBMISSION13008.doc* (suggesting simplifying the current SEC independence standards); Dana R. Hermanson, Kennesaw State University, Comment Letter Regarding Discussion Outline 1 (Oct. 4, 2007), available at *http://*

(b) Develop training materials to help foster and maintain the application of healthy professional skepticism with respect to issues of independence and other conflicts among public company auditors, and inspect auditing firms, through the PCAOB inspection process, for independence training of partners and mid-career professionals.

The Committee considered testimony and commentary that, to comply with the detailed and complex [268] requirements, some auditors may be taking a ''check the box'' approach to compliance with independence requirements, and losing focus on the critical need to exercise independent judgment or professional skepticism about whether the substance of a potential conflict of interest may compromise integrity or objectivity, or create an appearance of doing so.[269]

The Committee recommends that auditing firms develop appropriate independence training materials for auditing firms, especially partners and mid-career professionals, that help to foster a healthy professional skepticism with respect to issues of independence that is objectively focused and extends beyond a ''check the box'' mentality.[270] The training materials should focus on lessons learned and best practices observed by the PCAOB in its inspection process and the experience of other relevant regulators as appropriate. To ensure the implementation of this training on an overall basis, the PCAOB should review this training as part of its inspection program.

Recommendation 5. Adopt annual shareholder ratification of public company auditors by all public companies.

Although not statutorily required, the majority of public companies in the United States—nearly 95% of S&P 500 and 70%–80% of smaller companies—put auditor ratification to an annual shareholder vote.[271] Even though ratification of a company's auditor is non-binding, the Committee learned that corporate governance experts consider this a best practice serving as a ''check'' on the audit committee.[272] Pursuant to Sarbanes-Oxley, audit committees of exchange-listed companies must appoint, compensate, and oversee the auditor.[273] SEC rules implementing Sarbanes-Oxley specifically permit shareholder ratification of auditor selection.[274] Ratification allows shareholders to voice a view on the audit committee's work, including the reasonableness of audit fees and apparent conflicts of interest.

The Committee believes shareholder ratification of auditor selection through the annual meeting and proxy process can enhance the audit committee's oversight to ensure that the auditor is suitable for the company's size and financial reporting needs.[275] This may enhance competition in the audit industry. Accordingly, the Committee encourages such an approach as a best practice for all public companies. The Committee also urges exchange self-regulatory organizations to adopt such a requirement as a listing standard. In addition, to further enhance audit committee oversight and auditor accountability, the Committee recommends that disclosure in the company proxy statement regarding shareholder ratification include the name(s) of the senior auditing partner(s) staffed on the engagement.[276] The

comments.treas.gov/_files/HermansonStatement10407.pdf (stating that consulting and auditing were incompatible and posed a significant threat to the long-term sustainability of the profession); Record of Proceedings (Dec. 3, 2007) (Written Submission of Dennis M. Nally, Chairman and Senior Partner, PricewaterhouseCoopers LLP, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Nally120307.pdf* (''The independence rules should be re-evaluated periodically to examine whether the rules continue to strike the right balance between cost burden and benefit.''); Record of Proceedings (Dec. 3, 2007) (Written Submission of James S. Turley, Chairman and Chief Executive Officer, Ernst & Young LLP, 5), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Turley120307.pdf* (recommending consideration of potential changes to aspects of independence rules). Note that one witness called for adoption of a single set of independence rules for public and private companies. See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of Kurt N. Schacht, Managing Director, Centre for Financial Market Integrity, CFA Institute, 6), available at *http://www.treas.govoffices/domestic-finance/acap/submissions/06032008/Schacht060308.pdf.*

[268] See, e.g., Record of Proceedings (Dec. 3, 2007) (Written Submission of Michael P. Cangemi, President and Chief Executive Officer, Financial Executives International), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/12032007/Cangemi120307.pdf;* Financial Executives International, Recommendations to ADDRESS Complexity in Financial Reporting (Mar. 2007).

[269] See, e.g., Consideration of Fraud in a Financial Statement, Interim Auditing Standard AU 316, Paragraph.13 (Pub. Company Accounting Oversight Bd. 2002) (''Professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence.'').

[270] See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of Dan Guy, Former Vice President, Professional Standards and Services, American Institute of Certified Public Accountants, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Guy060308.pdf* (stating that auditors fail to detect material financial statement fraud due to, among other things, the lack of professional skepticism); Record of Proceedings (June 3, 2008) (Written Submission of Brian O'Malley, Senior Vice President and General Auditor, Nasdaq Stock Market, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/OMalley060308.pdf* (noting that ''auditor skepticism throughout an auditor's career is the keystone, all incentives and disincentives should be focused on its achievement''); PricewaterhouseCoopers, Comment Letter Regarding Draft Report and Draft Report Addendum 19, (June 30, 2008), available at *http://comments.treas.gov/_files/PwCCommentLtr TreasCmtDraftandAddendum63008.pdf* (stating that ''independence forms the bedrock of credibility in the auditing profession, and is essential to the firm's primary function in the capital markets'').

[271] Institutional Shareholder Services, ISS U.S. Corporate Governance Policy—2007 Update 3 (Nov. 15, 2006).

[272] Institutional Shareholder Services, Request for Comment—Ratification of Auditors ON THE Ballot 1.

[273] Sarbanes-Oxley Act, 15 U.S.C. § 78j–1 (2002).

[274] SEC, Final Rule: Standards Related to Listed Audit Committees. Release No. 33–8220 (Apr. 9, 2003).

[275] See also FRC Update 5, 7 (recommending that ''the FRC should amend the section of the Smith Guidance dealing with communications with shareholders to include a requirement for the provision of information relevant to the auditor re-selection decision,'' and that ''investor groups, corporate representatives, firms and the FRC should promote good practices for shareholder engagement on auditor appointment and re-appointments'').

[276] See, e.g., Andrew D. Bailey, Jr., Professor of Accountancy—Emeritus, University of Illinois, and Senior Policy Advisor, Grant Thornton LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 4, (June 16, 2008), available at *http://comments.treas.gov/_files/TREASURYLETTER3BAILEY61608.doc* (''Knowing that any failure will be clearly and unambiguously associated with the named individuals and that the veil of the firm will not be there to obscure their responsibility may be of value.''); Record of Proceedings (June 3, 2008) (Written Submission of Jean C. Bedard, Timothy B. Harbert Professor of Accounting, Department of Accountancy, Bentley College, 11), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Bedard060308.pdf* (supporting the Recommendation and suggesting further that the Committee recommend an advisory shareholder vote on each member of the audit committee for companies that have not adopted a majority vote provision for all board members, and that the engagement partner sign both his or her name as well as the firm's name to the audit report, making it a more direct public statement of responsibility than proxy disclosure); Paul Lee, Director, Hermes Equity Ownership Services Limited, Comment Letter Regarding Draft Report and Draft Report Addendum 4, (June 13, 2008), available at *http://comments.treas.gov/_files/ACAPresponse13Jun08.pdf* (stating that an auditor should not continue in office unless it receives a majority of the votes of shareholders in favor of ratification, and noting that accountability and professional judgment would be increased if auditors' reports were signed by individuals as well as in the names of the relevant audit firm); Record of Proceedings (June 3, 2008) (Written Submission of Kurt N. Schacht, Managing Director, Centre for Financial Market Integrity, CFA Institute, 6), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Schacht060308.pdf* (supporting the Recommendation and further recommending disclosure of other key engagement individuals in addition to the lead audit partner, and transparent disclosure of audit quality, firm financial strength, and professional skill level at least to the audit committee, if not publicly). But c.f., Deloitte LLP, Comment Letter Regarding Draft Report and Draft Report Addendum 21–22, (June 27, 2008), available at *http://comments.treas.gov/_files/*

Continued

Committee notes that there might be other audit-engagement specific data, such as the auditor's tenure with a specific public company client, useful to shareholders and audit committees.

Recommendation 6. Enhance regulatory collaboration and coordination between the PCAOB and its foreign counterparts, consistent with the PCAOB mission of promoting quality audits of public companies in the United States.

The globalization of the capital markets has compelled regulatory coordination and collaboration across jurisdictions. Regulators of public company auditors are no exception, as companies increasingly seek investor capital outside their home jurisdictions and the larger auditing firms create, expand, and, in some audits, increasingly rely on global networks of affiliates in order to provide auditing and other services to companies operating in multiple jurisdictions.[277] The Committee considered commentary regarding the PCAOB's regulatory role on a global basis.[278]

The PCAOB has the statutory responsibility for ensuring quality audits of public companies. In a world of global business operations and globalized capital markets, the PCAOB benefits from cooperation with foreign auditing firm regulators (many created and modeled after the PCAOB) to accomplish its inspections of registered foreign auditing firms, including firms that are members of global auditing firm networks.

In May 2007, the PCAOB hosted its first International Auditor Regulatory Institute where representatives from more than 40 jurisdictions gathered to learn more about PCAOB operations. In 2006, the PCAOB formally joined the International Forum of Independent Audit Regulators, created to encourage regulatory collaboration and sharing of regulatory knowledge and experience.

The Committee believes that these types of global regulatory coordination and cooperation are important elements in making sure public company auditing firms of all sizes are contributing effectively to audit quality. The Committee strongly supports the efforts of the PCAOB to enhance the efficiency and effectiveness of its programs by communicating with foreign regulators and participating in global regulatory bodies. The Committee urges the PCAOB and its foreign counterparts to continue to improve regulatory cooperation and coordination on a global basis.[279]

In addition, the Committee recognizes the challenges that the globalized regulatory environment creates for smaller firms, particularly with respect to the increasing acceptance of IFRS.[280] The Committee believes that regulators and policy makers must recognize the importance of including smaller firms in international roundtables, discussions, and policy making decisions.[281]

[FR Doc. E8–17441 Filed 7–29–08; 8:45 am]

BILLING CODE 4810–25–P

DeloitteLLPCommentLetter.pdf (noting that the Recommendation goes against the team nature of audits, raises personal security and privacy concerns, and is unrelated to audit quality); Ernst & Young LLP Comment Letter Regarding Draft Report and Draft Report Addendum 28, (June 27, 2008), available at *http://comments.treas.gov/_files/EYACAPCommentLetterFINAL.pdf;* Mayer Hoffman McCann P.C., Comment Letter Regarding Draft Report and Draft Report Addendum 3, (June 17, 2008), available at *http://comments.treas.gov/_files/MayerHoffmanMcCann CommentLetter.pdf* (suggesting that ''[o]ther individuals involved in the audit might actually feel less responsibility if only the engagement and concurring partners sign the report or only top partners are named, precisely the opposite of what should be encouraged''); David McDonnell, Chief Executive Officer, Grant Thornton International Ltd, and Edward E. Nusbaum, Chief Executive Officer, Grant Thornton LLP, and Chairman, Grant Thornton International Ltd Board of Governors, Comment Letter Regarding Draft Report and Draft Report Addendum 4, (June 27, 2008), available at *http://comments.treas.gov/_files/GTCommentletter toACAPJune2008_FINAL.pdf* (noting the team effort aspect of audits and stating that partners may be unwilling to accept the added risk, personal security issues, and privacy issues). As discussed above, the Committee also believes that this ratification process would be made more meaningful if accompanied by the development and disclosure of key indicators of audit quality.

[277] See Record of Proceedings (Feb. 4, 2008) (Written Submission of Cynthia M. Fornelli, Executive Director, Center for Audit Quality, 16), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/02042008/Fornelli020408.pdf* (noting the ''growing consensus that regulators on every continent would be well served by working more closely together in the interest of improving worldwide audit quality''); PCAOB Press Release, PCAOB Meets with Asian Counterparts to Discuss Cooperation on Auditor Oversight (Mar. 23, 2007), available at *http://www.pcaobus.org/News_and_Events/News/2007/03–23.aspx* (''The PCAOB strongly believes that dialogue and cooperation among auditor regulators are critical to every regulator's ability to meet the challenges that come with the increasingly complicated and global capital markets.'').

[278] See, e.g., PCAOB Briefing Paper, Oversight of Non-U.S. Public Accounting Firms (Oct. 28, 2003); PCAOB Final Rules Relating to the Oversight of Non-U.S. Public Accounting Firms, PCAOB Rel. No. 2004–005 (June 9, 2004); Request for Public Comment on Proposed Policy Statement: Guidance Regarding Implementation of PCAOB Rule 4012, PCAOB Rel. No. 2007–001 (Dec. 5, 2007); PCAOB Chairman Mark Olson and EU Commissioner Charlie McCreevy Meet to Discuss Furthering Cooperation in the Oversight of Audit Firms, PCAOB Press Rel. (March 6, 2007); PCAOB Meets with Asian Counterparts to Discuss Cooperation on Auditor Oversight, PCAOB Press Rel. (Mar. 23, 2007); Establishment of the International Forum of Independent Audit Regulators, Haut Conseil du Commissariat aux Comptes Press Rel. (Sep. 15, 2006); PCAOB Enters into Cooperative Arrangement with the Australian Securities and Investments Commission, PCAOB Press Rel. (July 16, 2007); Board Establishes Standing Advisory Group, PCAOB Press Rel. (Apr. 15, 2004).

[279] See, e.g., Joseph Carcello, Chair, AAA Task Force to Monitor the Activities of the Treasury ACAP Ernst & Young Professor and Director of Research—Corporate Governance Center University of Tennessee, Jean C. Bedard Timothy B. Harbert Professor of Accountancy Bentley College, Dana R. Hermanson Dinos Eminent Scholar Chair of Private Enterprise and Professor of Accounting Kennesaw State University, Comment Letter Regarding Draft Report and Draft Report Addendum 11, (May 15, 2008), available at *http://comments.treas.gov/_files/ACAPCommentLetterMay152008.pdf* (agreeing with the Recommendation); Record of Proceedings (June 3, 2008) (Written Submission of Brian O'Malley, Senior Vice President and General Auditor, Nasdaq Stock Market, 4), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/OMalley060308.pdf* (agreeing with the Recommendation); Record of Proceedings (June 3, 2008) (Written Submission of Kurt N. Schacht, Managing Director, Centre for Financial Market Integrity, CFA Institute, 6), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Schacht060308.pdf* (agreeing with this ''most important'' Recommendation).

[280] Record of Proceedings (June 3, 2008) (Questions for the Record of Mr. Kenneth Nielsen Goldmann, Capital Markets and SEC Practice Director, J.H. Cohn LLP, 21–22 (June 30, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/QFRs-6–3–08.pdf* (noting the difficulty and costs associated with implementing IFRS for smaller firms); Record of Proceedings (June 3, 2008) (Questions for the Record of Mr. Kurt N. Schacht, Managing Director, Centre for Financial Market Integrity, CFA Institute, 73–74 (June 30, 2008)), available at *http://www.treas.gov/offices/domestic-finance/acap/agendas/QFRs-6–3–08.pdf* (stating the difficulty in maintaining competence in IFRS, GAAP, and local/national standards).

[281] See, e.g., Record of Proceedings (June 3, 2008) (Written Submission of Kurt N. Schacht, Managing Director, Centre for Financial Market Integrity, CFA Institute, 3), available at *http://www.treas.gov/offices/domestic-finance/acap/submissions/06032008/Schacht060308.pdf* (stating that demonstrating technical competence in international matters is of increased importance especially for smaller firms).

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Axis Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 1 to the Treasury Department Circular 570, 2008 Revision, published July 1, 2008, at 73 FR 37644.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company:

Axis Insurance Company (NAIC # 37273)

Business Address: 11680 Great Oaks Way, Suite 500, Alpharetta, GA 30022. PHONE: (678) 746–9400.

Underwriting Limitation b/: $38,506,000.

Surety Licenses c/: AL, AK, AZ, AR, CO, DE, DC, FL, GA, HI, ID, IL, IN, KS, KY, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY.

Incorporated In: Illinois.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 (''Circular''), 2008 Revision, to reflect this addition.

Certificates of Authority expire on June each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR part 223). A list of qualified companies is published annually as of July 1st in the Circular, which outlines details as to the underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570*.

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: July 22, 2008.

Vivian L. Cooper,

Director, Financial Accounting and Services Division.

[FR Doc. E8–17439 Filed 7–29–08; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed and Continuing Information Collections Under the Paperwork Reduction Act; Annual Thrift Satisfaction Survey

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before September 29, 2008.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov*. OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov*. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Joanne Haakinson, (202) 906–6140, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Annual Thrift Satisfaction Survey.

OMB Number: 1550–0087.

Form Numbers: N/A.

Regulation requirement: N/A.

Description: The survey is needed to help OTS evaluate the effectiveness of the services it provides to thrifts.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit:

Estimated Number of Respondents: 200.

Estimated Number of Responses: 200.

Estimated Frequency of Response: Annually.

Estimated Total Burden: 50 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: July 24, 2008.

Deborah Dakin,

Senior Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. E8–17364 Filed 7–29–08; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed and Continuing Information Collections Under the Paperwork Reduction Act; Electronic Operations

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before September 29, 2008.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov*. OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov*. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Lewis C. Angel, (202) 906–5845, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Electronic Operations.

OMB Number: 1550–0095.

Form Numbers: N/A.

Regulation requirement: 12 CFR part 555.

Description: With the increased focus of institutions on the use of electronic channels to perform their daily operations and offer new products and services, the Office of Thrift Supervision (''OTS'') plays an important role in evaluating an institution's risks in the use of information technology.

Federal savings associations may use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. 12 CFR part 555. Electronic means or facilities include, but are not limited to, automated teller machines, automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices. The regulation also requires each savings association to notify OTS at least 30 days before establishing a transactional Web site. Savings associations that present supervisory or compliance concerns may be subject to additional procedural requirements.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 80.

Estimated Number of Responses: 80.

Estimated Frequency of Response: Other; transactionally.

Estimated Total Burden: 160 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: July 24, 2008.

Deborah Dakin,

Senior Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. E8–17362 Filed 7–29–08; 8:45 am]

BILLING CODE 6720–01–P

Federal Register

Wednesday,
July 30, 2008

Part II

Environmental Protection Agency

40 CFR Chapter I

Regulating Greenhouse Gas Emissions Under the Clean Air Act; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[EPA–HQ–OAR–2008–0318; FRL–8694–2]

RIN 2060–AP12

Regulating Greenhouse Gas Emissions Under the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: This advance notice of proposed rulemaking (ANPR) presents information relevant to, and solicits public comment on, how to respond to the U.S. Supreme Court's decision in *Massachusetts* v. *EPA*. In that case, the Supreme Court ruled that the Clean Air Act (CAA or Act) authorizes regulation of greenhouse gases (GHGs) because they meet the definition of air pollutant under the Act. In view of the potential ramifications of a decision to regulate GHGs under the Act, the notice reviews the various CAA provisions that may be applicable to regulate GHGs, examines the issues that regulating GHGs under those provisions may raise, provides information regarding potential regulatory approaches and technologies for reducing GHG emissions, and raises issues relevant to possible legislation and the potential for overlap between legislation and CAA regulation. In addition, the notice describes and solicits comment on petitions the Agency has received to regulate GHG emissions from ships, aircraft and nonroad vehicles such as farm and construction equipment. Finally, the notice discusses several other actions concerning stationary sources for which EPA has received comment regarding the regulation of GHG emissions.

The implications of a decision to regulate GHGs under the Act are so far-reaching that a number of other federal agencies have offered critical comments and raised serious questions during interagency review of EPA's ANPR. Rather than attempt to forge a consensus on matters of great complexity, controversy, and active legislative debate, the Administrator has decided to publish the views of other agencies and to seek comment on the full range of issues that they raise. These comments appear in the Supplemental Information, below, followed by the June 17 draft of the ANPR preamble prepared by EPA, to which the comments apply. None of these documents represents a policy decision by the EPA, but all are intended to advance the public debate and to help inform the federal government's decisions regarding climate change.

DATES: Comments must be received on or before November 28, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0318, by one of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail: a-and-rDocket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* EPA Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington DC, 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0318. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. For additional instructions on submitting comments, go to Section VII, Public Participation, of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Joe Dougherty, Office of Air and Radiation, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–1659; fax number: (202) 564–1543; e-mail address: *Dougherty.Joseph-J@epa.gov*.

SUPPLEMENTARY INFORMATION:

Preface From the Administrator of the Environmental Protection Agency

In this Advanced Notice of Proposed Rulemaking (ANPR), the Environmental Protection Agency (EPA) seeks comment on analyses and policy alternatives regarding greenhouse gas (GHG) effects and regulation under the Clean Air Act. In particular, EPA seeks comment on the document entitled ''Advanced Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act'' and observations and issues raised by other federal agencies. This notice responds to the U.S. Supreme Court's decision in *Massachusetts* v. *EPA* and numerous petitions related to the potential regulation of greenhouse gas emissions under the Clean Air Act.

EPA's analyses leading up to this ANPR have increasingly raised questions of such importance that the scope of the agency's task has continued to expand. For instance, it has become clear that if EPA were to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, then regulation of smaller stationary sources that also emit GHGs—such as apartment buildings, large homes, schools, and hospitals—could also be triggered. One point is clear: The potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.

This ANPR reflects the complexity and magnitude of the question of whether and how greenhouse gases could be effectively controlled under the Clean Air Act. This document summarizes much of EPA's work and lays out concerns raised by other federal agencies during their review of this work. EPA is publishing this notice today because it is impossible to simultaneously address all the agencies' issues and respond to our legal obligations in a timely manner.

I believe the ANPR demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations. These rules would largely pre-empt or overlay existing programs that help control greenhouse gas emissions and would be relatively ineffective at reducing greenhouse gas concentrations given the potentially damaging effect on jobs and the U.S. economy.

Your input is important. I am committed to making the data and models EPA is using to form our policies transparent and available to the public. None of the views or alternatives raised in this notice represents Agency decisions or policy recommendations. It is premature to do so. Rather, I am publishing this ANPR for public comment and review. In so doing, I am requesting comment on the views of other federal agencies that are presented below including important legal questions regarding endangerment. I encourage the public to (1) understand the magnitude and complexity of the Supreme Court's direction in *Massachusetts* v. *EPA* and (2) comment on the many questions raised in this notice.

BILLING CODE 6560–50–P

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

July 10, 2008

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Johnson:

I am writing with regard to the draft Advance Notice of Proposed Rulemaking (ANPR) "Regulating Greenhouse Gas Emissions Under the Clean Air Act," submitted to the Office of Management and Budget (OMB) on June 17, 2008 pursuant to Executive Order 12866. The issues raised during interagency review are so significant that we have been unable to reach interagency consensus in a timely way, and as a result, this staff draft cannot be considered Administration policy or representative of the views of the Administration. However, given the Administration's commitment to respond to the Supreme Court's decision in *Massachusetts v. EPA*, we have determined in this case that consensus is not necessary in order for EPA to seek public comment on the wide-ranging issues raised by the draft regarding the potential regulation of greenhouse gases under the Clean Air Act. Thus, as we have discussed, you are withdrawing the draft from review under Executive Order 12866, and I am waiving the requirement for review due to the extraordinary circumstances presented here. Of course, given the significance of any actions to address greenhouse gas emissions under the Clean Air Act, any future notice would be subject to interagency review under Executive Orders 12866 and 13342.

The enclosed letter from the Secretaries of Agriculture, Commerce, Transportation, and Energy, along with summaries of issues raised by their departments, and letters from the Chairman of the Council on Environmental Quality, the Director of the Office of Science and Technology Policy and the Chairman of the Council of Economic Advisors, and the Chief Counsel for Advocacy at the Small Business Administration identify important concerns. As reflected in these letters, there is strong disagreement with many of the legal, analytical, economic, science and policy interpretations in the draft; however, these letters do reflect agreement with you that the Clean Air Act is a deeply flawed and unsuitable vehicle for reducing greenhouse gas emissions. Interagency reviewers concluded upon reading the draft that trying to address greenhouse gas emissions through the existing provisions of the Clean Air Act will not only harm the U.S. economy, but will fail to provide an effective response to the global challenge of climate change.

As the President observed in April:

> Decisions with such far-reaching impact should not be left to unelected regulators and judges. Such decisions should be debated openly [and] made by the elected representatives of the people they affect.

EPA should seek public comment on the issues raised in the attached letters and should address these issues before it considers, and before OMB reviews, a notice of proposed rulemaking under the Clean Air Act.

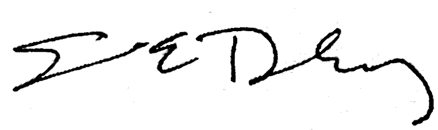
The draft sets out a hypothetical roadmap outlining ways in which different provisions of the Clean Air Act could be applied to address greenhouse gas emissions. Following such a regulatory roadmap could result in the piecemeal application of command-and-control regulation—based on EPA staff determinations of the availability and suitability of a wide range of technology—covering both U.S. manufacturing activity and a broad range of commercial and household activities to an extent well beyond the scope of current regulation. To illustrate:

- The draft observes that regulation under almost any section of the Act would trigger the prevention of significant deterioration (PSD) program, which could require case-by-case EPA permitting covering building design for large office and residential buildings, hotels, retail stores and other similarly-sized projects;
- The draft discusses potential requirements that would regulate the design of plants in the U.S. manufacturing sector to increase energy efficiency;
- The draft discusses various technologies to achieve greenhouse gas emission reductions in the trucking industry, including devices to limit vehicle speed;
- In the agricultural sector, the draft discusses animal feeding operations, agricultural soil management, and fire management practices as a source of greenhouse gas emissions;
- The draft discusses approaches to reduce greenhouse gas emissions from households, for example, it notes that it "could require a different unit of measure tied to [a] machine's mission or output—such as grams per kilogram of cuttings from a 'standard' lawn for lawnmowers";
- The draft suggests reducing greenhouse gases from shipping through both ship design and marine operations, including redesigning ship hulls, limiting ship speed, using less ballast, and regulating route planning and port management. (It notes that "innovative strategies for reducing hull friction include coatings with textures similar to marine animals…").

To mitigate the far reaching and potentially harmful effects of regulating greenhouse gases under the Clean Air Act, the draft offers several untested legal propositions for "flexible" interpretations of the Act. In the case of PSD permitting, which could capture thousands of small sources never before regulated under the Clean Air Act, the draft specifically acknowledges that these novel theories violate the plain meaning of the Act, but suggests "the plain meaning of legislation is not conclusive…" The draft also relies on untested legal theories to suggest that some Clean Air Act provisions could be adapted to provide economic incentives to reduce greenhouse gas emissions. For example, it suggests that a regulatory program based on National Ambient Air Quality Standards might permit the adoption of a nationwide cap-and-trade program. Even if this regulatory approach legally could support economic incentives, it would likely be narrowly focused to cover a limited set of activities, and would not successfully engage the ingenuity and creativity of American citizens so that future generations can continue to enjoy both prosperity and environmental quality.

Addressing greenhouse gas emissions may be the most significant environmental policy decision of our generation, and I respect that you are engaging public debate on the appropriateness of relying on the Clean Air Act, written decades ago to address different air quality concerns, to guide these policies. I appreciate that EPA will publish in the *Federal Register* this letter along with the enclosed letters from your Cabinet and other colleagues in addition to the June 17th EPA draft in order to facilitate public understanding of, and public comment on, the issues associated with regulating greenhouse gases under the Clean Air Act.

Sincerely,



Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

United States Department of Agriculture | United States Department of Commerce | United States Department of Transportation | United States Department of Energy

July 9, 2008

The Honorable Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Dudley:

The Departments of Agriculture, Commerce, Transportation, and Energy have serious concerns with the draft Advance Notice of Proposed Rulemaking "Regulating Greenhouse Gas Emissions under the Clean Air Act" ("draft") submitted by the Environmental Protection Agency to the Office of Management and Budget on June 17, 2008.

Climate change is a significant issue for both our environment and our economy, and the nations of the world must act together to address greenhouse gas ("GHG") emissions. The United States currently is working with the world's major emitting economies to devise a new international framework to replace the one that expires in 2012. In addition, since 2001 our agencies have committed billions of dollars and have taken other actions to confront climate change through the development and deployment of new technologies; through rulemakings to increase fuel economy, energy efficiency, and the production and use of alternative fuels; and through significantly increased investment in new climate science research. These and other serious efforts to address climate change must continue.

The EPA staff now has prepared a draft suggesting that the Clean Air Act can be both workable and effective for addressing global climate change by regulating GHG emissions from stationary and mobile sources of virtually every kind. Our agencies have serious concerns with this suggestion because it does not fairly recognize the enormous—and, we believe, insurmountable—burdens, difficulties, and costs, and likely limited benefits, of using the Clean Air Act to regulate GHG emissions.

First, the Clean Air Act is fundamentally ill-suited to the effective regulation of GHG emissions. Indeed, the draft acknowledges that "the [Clean Air Act] was not specifically designed to address GHGs." Instead, the Clean Air Act is premised on the idea that controlling emissions in the United States will improve air quality in the United States, and that a State or region can improve its air quality by controlling emissions in that area. This is not true in the case of GHGs. Controlling GHG emissions in the United States will reduce atmospheric concentrations of those gases only if our emissions reductions are not simply replaced with emissions increases elsewhere in the world. Moreover, under the Clean Air Act, emissions requirements generally are related to a health-based or public-welfare-based air quality standard. Yet there is no such standard for GHGs in the Act or elsewhere, and thus the draft seems to take the approach of seeking emissions reductions with no precise idea of exactly what goal is being pursued or what GHG concentration-level objective is to be achieved.

Second, the use of the Clean Air Act to regulate GHG emissions unilaterally as envisioned in the draft would harm America's international competitiveness. Applying Clean Air Act regulations to U.S. businesses in order to address global climate change—outside of any international framework that brings together all of the world's major economies, both developed and developing—would simply export economic activity and emissions to less-regulated countries and might not generate any net reduction in worldwide GHG emissions. According to the Energy Information Administration, carbon dioxide emissions in non-OECD (Organization for Economic Cooperation and Development) nations already surpass those of OECD nations and are estimated to exceed them by 72 percent in 2030. The draft does not take account of these realities, and instead builds a regime that would impose enormous costs on U.S. consumers, workers, and businesses without addressing the fundamental shift in emissions growth from the developed world to the developing world.

Third, while acknowledging that "the complexity and interconnections inherent in [Clean Air Act] regulation of GHGs" has caused EPA staff to "not believe that all aspects of the Act are well designed for establishing the kind of comprehensive GHG regulatory program that could most effectively achieve the GHG emission reductions that may be needed over the next several decades," the draft nevertheless suggests that regulating GHGs under the Clean Air Act would be workable. We disagree. The draft offers a number of legal constructs to support its position, but there is no certainty of how those theories will work in actuality, or whether they would be upheld by the courts. Such legal uncertainty simply emphasizes the risk to the Nation's energy, economic, and environmental security of seeking to shoehorn a GHG regulatory program into the Clean Air Act. Moreover, some might read the draft's discussion of an array of GHG regulatory constructs to prejudge the question of endangerment, even though there are critical open issues that must be addressed and resolved in making that legal determination and which must be decided before GHG emissions can be regulated under the Clean Air Act.

Even if the Act could support all of the legal theories outlined in the draft, the suggested permitting regimes would be extraordinarily intrusive and burdensome. In fact, the draft recognizes that regulation of GHG emissions under the Clean Air Act would likely extend permitting requirements and emissions controls to many sources not previously subject to Clean Air Act regulation, such as large buildings heated by natural gas. This could lead to EPA exercising de facto zoning authority through control over thousands of what formerly were local or private decisions, impacting the construction of schools, hospitals, and commercial and residential development.

Fourth, although the draft sets forth data and analysis that could be useful in the overall debate about GHGs, our agencies disagree with many of the assumptions in the draft about the costs of controlling GHGs, the technologies currently available and potentially available in the future, the timeline for the development of some of those technologies, and the potential harm from and benefits of controlling GHG emissions from specific sources. Moreover, there are important

The Honorable Susan E. Dudley
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differences between the draft and the peer-reviewed reports recently issued by the U.S. Climate Change Science Program—an interagency program in which EPA has been a key participant.

Finally, the draft suggests approaches to control GHG emissions that would needlessly duplicate newly passed laws and effectively ignore regulatory initiatives currently underway. For example, the Department of Transportation is already conducting a rulemaking to update fuel economy standards for light trucks and automobiles, pursuant to the recently enacted Energy Independence and Security Act of 2007. The draft suggests the possibility of an overlapping regulatory mandate using the Clean Air Act, potentially creating inconsistent regulatory mandates and uncertainty for U.S. industries and consumers, with minimal if any improvements in U.S. greenhouse gas emissions.

In sum, global climate change presents a serious challenge, and a workable and meaningful approach must be crafted to address that challenge. Unfortunately, using the Clean Air Act is not such an approach, as the draft sometimes acknowledges, but does not realistically address. In the enclosures with this letter, our respective agencies have provided brief analyses of some of the key technical, economic, and analytical difficulties with the draft, and our agencies may supplement these comments at a later date.

Sincerely,

Edward T. Schafer
Secretary
U.S. Department of Agriculture

Carlos M. Gutierrez
Secretary
U.S. Department of Commerce

Mary E. Peters
Secretary
U.S. Department of Transportation

Samuel W. Bodman
Secretary
U.S. Department of Energy

Enclosures

U.S. Department of Transportation
U.S. Department of Energy
U.S. Department of Commerce
U.S. Department of Agriculture

Department of Transportation

The Department of Transportation (''the Department'' or ''DOT'') hereby submits the following preliminary comments on the Environmental Protection Agency (''EPA'') staff's draft Advance Notice of Proposed Rulemaking ''Regulating Greenhouse Gas Emissions under the Clean Air Act,'' which was submitted to the Office of Management and Budget on June 17, 2008 (''June 17 draft'' or ''draft''). In view of the very short time the Department has had to review the document, DOT will offer a longer, more detailed response by the close of the comment period.

General Considerations

In response to *Massachusetts* v. *EPA* and multiple rulemaking petitions, the EPA must consider whether or not greenhouse gases may reasonably be anticipated to endanger public health or welfare, within the meaning of the Clean Air Act. Such a determination requires the resolution of many novel questions, such as whether global or only U.S. effects should be considered, how imminent the anticipated endangering effects are, and how greenhouse gases are to be quantified, to name just a few. Without resolving any of these questions, let alone actually making an endangerment finding, the June 17 draft presents a detailed discussion of regulatory possibilities. In other words, the draft suggests an array of specific regulatory constructs in the transportation sector under the Clean Air Act without the requisite determinations that greenhouse gas emissions endanger public health or welfare and that regulation is feasible and appropriate. In fact, to propose specific regulations prejudices those critical determinations and reveals a predilection for regulation that may not be justified.

Policymakers and the public must consider a broader question: even if greenhouse gas regulation using a law designed for very different environmental challenges is legally permissible, is it desirable? We contend that it is not. We are concerned that attempting to regulate greenhouse gases under the Clean Air Act will harm the U.S. economy while failing to actually reduce global greenhouse gas emissions. Clean Air Act regulation would necessarily be applied unevenly across sources, sectors, and emissions-causing activities, depending on the particular existing statutory language in each section of the Act. Imposing Clean Air Act regulations on U.S. businesses, without an international approach that involves all of the world's major emitters, may well drive U.S. production, jobs, and emissions overseas, with no net improvement to greenhouse gas concentrations.

The Department believes that the Nation needs a well considered and sustainable domestic climate change policy that takes into account the best climatological, technical and economic information available. That policy—as with any significant matter involving Federal law and regulation—should also reflect a national consensus that the actions in question are justified and effective, and do not bring with them substantial unintended consequences or unacceptable economic costs. Reducing greenhouse gas emissions across the various sectors of our economy is an enormous challenge that can be met effectively only through the setting of priorities and the efficient allocation of resources in accordance with those priorities.

It is an illusion to believe that a national consensus on climate policy can be forged via a Clean Air Act rulemaking. Guided by the provisions of a statute conceived for entirely different purposes—and unconstrained by any calculation of the costs of the specific regulatory approaches it contemplates—such a rulemaking is unlikely to produce that consensus.

Administrator Johnson of the EPA said in a recent speech, ''now is the time to begin the public debate and upgrade [the Clean Air Act's] components.'' Administrator Johnson has called for fundamental changes to the Clean Air Act ''to consider benefits, costs, risk tradeoffs and feasibility in making decisions about how to clean the air.'' This, of course, is a criticism of the Clean Air Act's ability to address its intended purposes, let alone purposes beyond those Congress contemplated. As visualized in the June 17 draft, the U.S. economy would be subjected to a complex set of new regulations administered by a handful of people with little meaningful public debate and no ability to consider benefits, costs, risk tradeoffs and feasibility. This is not the way to set public policy in an area critical to our environment and to our economy.

As DOT and its fellow Cabinet departments argue in the cover letter to these Comments, using the Clean Air Act as a means for regulating greenhouse gas emissions presents insurmountable obstacles. For instance, Clean Air Act provisions that refer to specific pollutants, such as sulfur dioxide, have been updated many times over the past three decades. In contrast, the language referring to unspecified pollutants, which would apply to greenhouse gases, retains, in fossil form, the 1970s idea that air pollution is a local and regional scale problem, with pollution originating in motor vehicles and a few large facilities, for which ''end of pipe'' control technologies exist or could be invented at acceptable cost. Greenhouse gas emissions have global scale consequences, and are emitted from millions of sources around the world. If implemented, the actions that the draft contemplates would significantly increase energy and transportation costs for the American people and U.S. industry with no assurance that the regulations would materially affect global greenhouse gas atmospheric concentrations or emissions.

Transportation-Related Considerations

As the Nation's chief transportation regulatory agency, the Department has serious concerns about the draft's approach to mobile sources, including, but not limited to, the autos, trucks, and aircraft that Section VI of the draft considers regulating.

Title II of the Clean Air Act permits the use of technology-forcing regulation of mobile sources. Yet Section VI of the draft appears to presume an endangerment finding with respect to emissions from a variety of mobile sources and then strongly suggests the EPA's intent to regulate the transportation sector through an array of source-specific regulations. Thus, much of Section VI is devoted to describing and requesting information appropriate to setting technology-forcing performance standards for particular categories of vehicles and engines based on an assessment of prospective vehicle and engine technology in each source category.

In its focus on technology and performance standards, the draft spends almost no effort on assessing how different regulatory approaches might vary in their effectiveness and compliance costs. This despite the fact that picking an efficient, effective, and relatively unintrusive regulatory scheme is critically important to the success of any future program—and far more important at this stage than identifying the cost-effectiveness of speculative future technologies.

The draft fails to identify the market failures or environmental externalities in the transportation sector that regulation might correct, and, in turn, what sort of regulation would be best tailored to correcting a specific situation. Petroleum accounts for 99 percent of the energy use and greenhouse gas emissions in the transportation sector. Petroleum prices have increased fivefold since 2002. Rising petroleum prices are having a powerful impact on airlines, trucking companies, marine operators, and railroads, and on the firms that supply vehicles and engines to these industries. Petroleum product prices have doubled in two years, equivalent to a carbon tax of $200 per metric ton, far in excess of the cost of any previously contemplated climate change measure. Operators are searching for every possible operating economy, and capital equipment manufacturers are fully aware that fuel efficiency is a critical selling point for new aircraft, vehicles, and engines. At this point, regulations could provide no more powerful incentive for commercial operators than that already provided by fuel prices. Badly designed performance standards would be at best non-binding (if private markets demand more efficiency than the regulatory standard) or would actually undermine efficient deployment of fuel efficient technologies (if infeasible or non-cost-effective standards are required).

Light Duty Vehicles

On December 19, 2007, the President signed the Energy Independence and Security Act (''EISA''), which requires the Department to implement a new fuel economy standard for passenger cars and light trucks. The Department's National Highway Traffic Safety Administration (''NHTSA'') has moved swiftly to comply with this law, issuing a Notice of Proposed Rulemaking (''NPRM'') on April 22, 2008. The comment period for this NPRM closed on July 1, 2008. If finalized in its present form, the rule would reduce U.S. carbon dioxide emissions by an estimated 521 million metric tons over the lifetime of the regulated vehicles.

This NPRM is only the latest in a series of NHTSA Corporate Average Fuel Economy (''CAFE'') program rules proposed or implemented during this Administration. Indeed, these proposals together represent the most aggressive effort to increase the fuel economy (and therefore to reduce the emissions) of the U.S. fleet since the inception of the CAFE program in 1975.

In enacting EISA, Congress made careful and precise judgments about how standards are to be set for the purpose of requiring the installation of technologies that reduce fuel consumption. Although almost all technologies that reduce carbon dioxide emissions do so by reducing fuel consumption, the EPA staff's June 17 draft not only ignores those congressional judgments, but promotes approaches inconsistent with those judgments.

The draft includes a 100-page analysis of a tailpipe carbon dioxide emissions rule that has the effect of undermining NHTSA's carefully balanced approach under EISA. Because each gallon of gasoline contains approximately the same amount of carbon, and essentially all of the carbon in fuel is converted to carbon dioxide, a tailpipe carbon dioxide regulation and a fuel economy regulation are essentially equivalent: they each in effect regulate fuel economy.

In the draft's analysis of light duty vehicles, the external benefits of reducing greenhouse gas emissions account for less than 15 percent of the total benefits of improving vehicle efficiency, with the bulk of the benefits attributable to the market value of the gasoline saved. Only rather small marginal reductions in fuel consumption or greenhouse gas emissions would be justified by external costs in general, and climate change benefits in particular. Thus, the draft actually describes fuel economy regulations, which generate primarily fuel savings benefits, under the rubric of environmental policy.

Though it borrows an analytical model provided by NHTSA, the draft uses differing assumptions and calculates the effects of the Agency's standard differently than does the rule NHTSA proposed pursuant to EISA. The draft conveys the incorrect impression that the summary numbers such as fuel savings, emission reductions, and economic benefits that are presented in the draft are comparable with those presented in NHTSA's NPRM, when in fact the draft's numbers are calculated differently and, in many cases, using outdated information.

The draft does not include the provisions of EISA or past, current, or future CAFE rulemakings in its baseline analysis of light duty vehicle standards. Thus, the draft inflates the apparent benefits of a Clean Air Act light duty vehicle rulemaking when much of the benefits are already achieved by laws and regulations already on the books. The draft fails to ask whether additional regulation of light duty vehicles is necessary or desirable, nor gives any serious consideration how Clean Air Act and EISA authorities might be reconciled.

The draft comprehensively mischaracterizes the available evidence on the relationship between safety and vehicle weight. In the draft, EPA asserts that the safety issue is ''very complex,'' but then adds that it disagrees with the views of the National Academy of Sciences (NAS) and NHTSA's safety experts, in favor of the views of a two-person minority on the NAS panel and a single, extensively criticized article.

Much of the text of this portion of the draft is devoted to a point-by-point recitation and critique of various economic and technological assumptions that NHTSA, the Office of Management and Budget, and other Federal agencies—among them EPA—painstakingly calculated over the past year, but that EPA now unilaterally revises for this draft. It is not clear why it is necessary or desirable to use one set of analytical assumptions, while the rest of the Federal Government uses another.

The public interest is ill-served by having two competing proposals, put forth by two different agencies, both purporting to regulate the same industry and the same products in the same ways but with differing stringencies and enforcement mechanisms, especially during a time of historic volatility in the auto industry and mere months after Congress passed legislation tasking another agency with regulation in this area. The detailed analysis of a light duty vehicle rule in the draft covers the same territory as does NHTSA's current rulemaking—and is completely unnecessary for the purposes of an endangerment finding or for seeking comment on the best method of regulating mobile source emissions.

Setting Air Quality Standards

The discussion of the process for setting National Ambient Air Quality Standards (''NAAQS'') and development of state/Federal implementation plans for greenhouse gases is presented as an option for regulating stationary sources, and is placed in the discussion of stationary sources. The draft describes a scenario in which the entire country is determined to be in nonattainment.

Such a finding would reach beyond power plants and other installations to include vital transportation infrastructure such as roads, bridges, airports, ports, and transit lines. At a time when our country critically needs to modernize our transportation infrastructure, the NAAQS that the draft would establish—and the development of the implementation plans that would follow—could seriously undermine these efforts. Because the Clean Air Act's transportation and general conformity requirements focus on local impacts, these procedures are not capable of assessing and reducing impacts of global pollutants without substantial disruption and waste.

If the entire Nation were found to be in nonattainment for carbon dioxide or multiple greenhouse gases, and transportation and general conformity requirements applied to Federal activities, a broad range of those activities would be severely disrupted. For example, application of transportation conformity requirements to all metropolitan area transportation plans would add layers of additional regulations to an already arduous Federal approval process and expand transportation-related litigation without any assurance that global greenhouse gas emissions would be reduced. Indeed, needed improvements to airports, highways and transit systems that would make the transportation system more efficient, and thus help reduce greenhouse gas and other emissions, could be precluded due to difficulties in demonstrating conformity. Though the potential for such widespread impact is clear from even a cursory reading of the draft, it ignores the issue entirely.

For these reasons, we question the practicality and value of establishing NAAQS for greenhouse gases and applying such a standard to new and existing transportation infrastructure across the Nation.

Heavy Duty Vehicles

The draft contemplates establishing a greenhouse gas emissions standard for heavy duty vehicles such as tractor-trailers. The draft's discussion of trucks makes no mention of the National Academy of Sciences study required by Section 108 of EISA that would evaluate technology to improve medium and heavy-duty truck fuel efficiency and costs and impacts of fuel efficiency standards that may be developed under 49 U.S.C. Section 32902(k), as amended by section 102(b) of EISA. This section directs DOT, in consultation with EPA and DOE, to determine test procedures for measuring and appropriate procedures for expressing fuel efficiency performance, and to set standards for medium- and heavy-duty truck efficiency. DOT believes that it is premature to review potential greenhouse gas emission standards for medium- and heavy-duty trucks in light of this study and anticipated future standard-setting action under EISA, and, in any event, that it is problematic to do so with no accounting of the costs that these standards might impose on the trucking industry.

In the case of light duty vehicles, it can be argued that consumers do not accurately value fuel economy, and regulation can correct this failure. Heavy-duty truck operators, on the other hand, are acutely sensitive to fuel costs, and their sensitivity is reflected in the product offerings of engine and vehicle manufacturers. The argument for fuel economy or tailpipe emissions regulation is much harder to make than in the case of light duty vehicles.

The medium and heavy truck market is more complex and diverse than the light duty vehicle market, incorporating urban delivery vans, on-road construction vehicles, work trucks with power-using auxiliaries, as well as the ubiquitous long-haul truck-trailer combinations. Further, a poorly designed performance standard that pushes operators into smaller vehicles may result in greater and not fewer of the emissions the draft intends to reduce. Because freight-hauling performance is maximized by matching the vehicle to the load, one large, high horsepower truck will deliver a large/heavy load at a lower total and fuel cost than the same load split into two smaller, low horsepower vehicles.

Railroads

The Clean Air Act includes a special provision for locomotives, Section 213(a)(5), which permits EPA to set emissions standards based on the greatest emission reduction achievable through available technology. The text of the draft suggests that EPA may consider such standards to include hybrid diesel/electric locomotives and the application of dynamic braking.

As in other sectors, it is hard to imagine how a technology-forcing regulation can create greater incentives than provided by recent oil prices. And sensible public policy dictates caution against imposing unrealistic standards or mandating technology that is not cost-effective, not reliable, or not completely developed.

Marine Vessels

The International Maritime Organization (''IMO'') sets voluntary standards for emissions from engines used in ocean-going marine vessels and fuel quality through the MARPOL Annex VI (International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (''MARPOL''), Annex VI, Prevention of Air Pollution from Ships). Member parties apply these voluntary standards through national regimes. The IMO is also working to consider ways to address greenhouse gas emissions from vessels and marine transportation, including both vessel-based and operational measures. The U.S. is a participant in these discussions. We believe that the discussion of ways to reduce greenhouse gas emissions from vessels and marine transportation should reference the IMO voluntary measures and discussions, and need not address detailed technological or operational measures.

Aviation

The draft includes a lengthy discussion of possible methods by which to regulate the greenhouse gas emissions of aircraft. For all its detail, however, the draft does not provide adequate information (and in some instances is misleading) regarding aviation emissions related to several important areas: (1) The overwhelming market pressures on commercial airlines to reduce fuel consumption and therefore carbon dioxide emissions and the general trends in aviation emissions growth; (2) expected technology and operational improvements being developed under the interagency Next Generation Air Transportation System (''NextGen'') program; (3) the work and role of the International Civil Aviation Organization (''ICAO'') in aviation environmental matters; (4) limits on EPA's ability to impose operational controls on aviation emission; and (5) the scientific uncertainty regarding greenhouse gas emissions from aircraft.

First, the draft does not provide the public an accurate picture of aviation emissions growth. Compared to 2000, U.S. commercial aviation in 2006 moved 12 percent more passengers and 22 percent more freight while burning less fuel, thereby reducing carbon output. Further, the draft's projections of growth in emissions are overstated because they do not reflect technology improvements in aircraft or air traffic operations and apparently do not take into account the industry's ongoing contraction or even the sustained increase in aviation jet fuel prices in 2007 and 2008. That increase (in 2008, U.S. airlines alone will spend $60 billion for fuel, compared to $16 billion in 2000) provides an overwhelming economic incentive for a financially troubled industry to reduce fuel consumption. Because reduction of a gallon of jet fuel displaces about 21 pounds of carbon dioxide, that incentive is the single most effective tool for reducing harmful emissions available today. Yet the draft makes no note of the trend.

Second, the draft does not adequately address the multi-agency NextGen program, one of whose principal goals is to limit or reduce the impact of aviation emissions on the global climate. This includes continued reduction of congestion through modernization of the air traffic control system, continued research on aircraft technologies and alternative fuels, and expanded deployment of operational advances such as Required Navigation Performance that allow aircraft to fly more direct and efficient routes in crowded airspace. Through NextGen, the Department's Federal Aviation Administration (FAA), in cooperation with private sector interests, is actively pursuing operational and technological advances that could result in a 33 percent reduction in aircraft fuel burn and carbon dioxide emissions.

Third, the draft gives short shrift to the Administration's efforts to reduce aviation emissions through a multilateral ICAO process, and it contemplates regulatory options either never analyzed by EPA or the aviation community for aircraft (''fleet averaging''[1]) or previously rejected by ICAO itself (flat carbon dioxide standards). The FAA has worked within the ICAO process to develop guidance for market-based measures, including adoption at the 2007 ICAO Assembly of guidance for emissions trading for international aviation. ICAO has established a Group on International Aviation and Climate Change that is developing further recommendations to address the aviation impacts of climate change.[2] The FAA's emphasis on international collaboration is compelled by the international nature of commercial aviation and the fact that performance characteristics of engines and airframes—environmental and otherwise—work best when they maximize consistency among particular national regulations.[3]

Fourth, the draft invites comments on potential aviation operational controls that might have emissions benefits. But proposals for changes to airspace or air traffic operational procedures usurp the FAA's responsibility as the Nation's aviation safety regulator and air traffic manager. It is inappropriate for the EPA to suggest operational controls without consideration of the safety implications that the FAA is legally required to address.

Finally, the draft does not accurately present the state of scientific understanding of aviation emissions and contains misleading statements about aviation emissions impacts. The report of the Intergovernmental Panel on Climate Change (cited in the draft but often ignored) more clearly conveys cautions about underlying uncertainties associated with regulating aviation emissions. For instance, the IPCC specifically concludes that water vapor is a small contributor to climate change, yet the draft focuses on condensation trails produced by water vapor and includes an inaccurate statement that carbon dioxide and water vapor are ''the major compounds from aircraft operations that are related to climate change.'' Further, the draft does not convey the significant scientific uncertainty associated with measuring particulate matter (PM) emissions from aircraft engines. That understanding needs to be significantly improved before any ''tailpipe'' PM standard could sensibly be considered.

Conclusion

The EPA has made an enormous effort in assembling the voluminous data that contributed to the draft as published today. However, because the draft does not adequately identify or discuss the immense difficulties and burdens, and the probable lack of attendant benefits, that would result from use of the Clean Air Act to regulate GHG emissions, DOT respectfully submits these preliminary comments to point out some of the problematic aspects of the draft's analysis regarding the transportation sector. We anticipate filing additional comments before the close of the comment period.

Department of Energy

I. Introduction

The U.S. Department of Energy (Department or DOE) strongly supports aggressively confronting climate change in a rational manner that will achieve real and sustainable reductions in global greenhouse gas (GHG) emissions, promote energy security, and ensure economic stability. In support of these goals, DOE believes that the path forward must include a comprehensive public discussion of potential solutions, and the foreseeable impacts of those proposed solutions—including impacts on energy security and reliability, on American consumers, and on the Nation's economy.

The Department supports the actions taken by the United States to date to address global climate change and greenhouse gas emissions, and believes these efforts should be continued and expanded. These actions have included a broad combination of market-based regulations, large increases in funding for climate science, new government incentives for avoiding, reducing or sequestering GHG emissions, and enormous increases in funding for technology research. The Department has played a significant role in implementing many of these initiatives, including those authorized by the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007.

The Department believes that an effective and workable approach to controlling GHG emissions and addressing global climate change should not simply consist of a unilateral and extraordinarily burdensome Clean Air Act (CAA or the Act) regulatory program being layered on top of the U.S. economy, with the Federal Government taking the position that energy security and indeed the American economy will just have to live with whatever results such a program produces. Rather, the United States can only effectively address GHG emissions and global climate change in coordination with other countries, and by addressing how to regulate GHG emissions while considering the effect of doing so on the Nation's energy and economic security. Considering and developing such a comprehensive approach obviously is enormously difficult.

Unfortunately, and no doubt due in part to the limitations of the Clean Air Act itself, the draft Advance Notice of Proposed Rulemaking prepared by the staff of the Environmental Protection Agency (EPA) does not take such an approach. That draft Notice, entitled ''Regulating Greenhouse Gas Emissions under the Clean Air Act'' (''draft''), which was submitted to the Office of Management and Budget on June 17, 2008, instead seeks to address global climate change through an enormously elaborate, complex, burdensome and expensive regulatory regime that would not be assured of significantly mitigating global atmospheric GHG concentrations and global climate change. DOE believes that once the implications of the approach offered in the draft are fully explained and understood, it will make one thing clear about controlling GHG emissions and addressing global climate change—unilaterally proceeding with an extraordinarily burdensome and costly regulatory program under the Clean Air Act is not the right way to go.

DOE has had only a limited opportunity to review the June 17 EPA staff draft, and therefore anticipates providing additional comments at a later date. Based on the limited review DOE has been able to conduct so far, it is apparent that the draft reflects extensive work and includes valuable information, analyses and data that

[1] The concept of ''fleet averaging,'' though used for automobiles, has never been applied to aviation or considered by either ICAO or FAA as a basis for standard setting. The draft offers little indication of why the concept would be worth serious consideration, and it is difficult to understand how that could be, given that manufacturers turn out only several hundred commercial airplanes for ''averaging'' annually, compared to over a million light duty vehicles per year built by large manufacturers. In any event, if further analysis supports the viability of fleet averaging, the appropriate venue for pursuing this would be through ICAO—so that aviation experts from around the world can assess the concept.

[2] In this context, we note that the draft invites comment on proposals in the European Union regarding an emissions trading scheme to be imposed by the EU on all Europe-connected commercial operations. The U.S. Government, led by the Department of State, has repeatedly argued that any of these proposals, if enacted, would violate international aviation law and has made clear its opposition to the proposals in ICAO and other international fora. It is curious that the EPA would solicit comments on the benefits of proposals that the United States (along with numerous other nations) opposes as unlawful and unworkable.

[3] The draft is potentially misleading in suggesting that the fuel flow rate data reported for the ICAO landing and takeoff cycle engine emissions certification process, and the carbon dioxide emissions concentrations data collected for calculation and calibration purposes may be used as the basis for a carbon dioxide standard.

should help inform the public debate concerning global climate change and how to address GHG emissions.

However, DOE has significant concerns with the draft because it lacks the comprehensive and balanced discussion of the impacts, costs, and possible lack of effectiveness were the United States, through the EPA, to use the CAA to comprehensively but unilaterally regulate GHG emissions in an effort to address global climate change. The draft presents the Act as an effective and appropriate vehicle for regulating GHG emissions and addressing climate change, but we believe this approach is inconsistent with the Act's overarching regulatory framework, which is based on States and local areas controlling emissions of air pollutants in order to improve U.S. air quality. Indeed, the Act itself states that Congress has determined ''air pollution prevention * * * and air pollution control at its source is the primary responsibility of States and local governments,'' CAA § 101(a)(3); that determination is reflected in the Act's regulatory structure. The CAA simply was not designed for establishing the kind of program that might effectively achieve global GHG emissions controls and emissions reductions that may be needed over the next decades to achieve whatever level of atmospheric GHG concentration is determined to be appropriate or necessary.

Although the draft recognizes that the CAA does not authorize ''economy-wide'' cap and trade programs or emission taxes, it in essence suggests an elaborate regulatory regime that would include economy-wide approaches and sector and multi-sector trading programs and potentially other mechanisms yet to be conceived. The draft has the overall effect of suggesting that under the CAA, as it exists today, it would be possible to develop a regulatory scheme of trading programs and other mechanisms to regulate GHG emissions and thus effectively address global climate change. It is important to recognize, however, that such programs have not yet been fully conceived, in some cases rely on untested legal theories or applications of the Act, would involve unpredictable but likely enormous costs, would be invasive into virtually all aspects of the lives of Americans, and yet would yield benefits that are highly uncertain, are dependent on the actions of other countries, and would be realized, if at all, only over a long time horizon.

The draft takes an affirmative step towards the regulation of stationary sources under the Act—and while it is easy to see that doing so would likely dramatically increase the price of energy in this country, what is not so clear is how regulating GHG emissions from such sources would actually work under the CAA, or whether doing so would effectively address global climate change. Other countries also are significant emitters of GHGs, and ''leakage'' of U.S. GHG emissions could occur—that is, reduced U.S. emissions simply being replaced with increased emissions in other countries—if the economic burdens on U.S. GHG emissions are too great. In that regard, CAA regulation of GHG emissions from stationary sources would significantly increase costs associated with the operation of power plants and industrial sources, as well as increase costs associated with direct energy use (*e.g.*, natural gas for heating) by sources such as schools, hospitals, apartment buildings, and residential homes.

Furthermore, in many cases the regulatory regime envisioned by the draft would result in emission controls, technology requirements, and compliance costs being imposed on entities that have never before been subject to direct regulation under the CAA. Before proceeding down that path, EPA should be transparent about, and there should be a full and fair discussion about, the true burdens of this path—in terms of its monetary cost, in terms of its regulatory and permitting burden, and in terms of exactly who will bear those costs and other burdens. These impacts are not adequately explored or explained in the draft. What should be crystal clear, however, is that the burdens will be enormous, they will fall on many entities not previously subject to direct regulation under the Act, and all of this will happen even though it is not clear what precise level of GHG emissions reduction or atmospheric GHG concentration level is being pursued, or even if that were decided, whether the CAA is a workable tool for achieving it.

In the limited time DOE has had to review the draft, DOE primarily has focused on the extent to which the draft addresses stationary sources and the energy sector. Based on DOE's review, we briefly discuss below (1) the inadequacy of CAA provisions for controlling greenhouse gas emissions from stationary sources as a method of affecting global GHG concentrations and addressing global climate change; (2) the potential costs and effects of CAA regulation of GHG emissions on the U.S. electric power sector; and (3) considerations for U.S. action to address GHG emissions from stationary sources in the absence of an effective global approach for addressing climate change and worldwide GHG emissions.

II. The Ineffectiveness and Costs Associated with CAA Regulation of Greenhouse Gas Emissions from Stationary Sources

The draft states that it was prepared in response to the decision of the United States Supreme Court in *Massachusetts* v. *EPA*, 549 U.S. ___, 127 S. Ct. 1438 (2007). In that case, the Court held that EPA has the authority to regulate GHG emissions from new motor vehicles because GHGs meet the Clean Air Act's definition of an ''air pollutant.'' *Id.* at 1460. As a result, under section 202(a) of the Act, the EPA Administrator must decide whether, ''in his judgment,'' ''the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines'' ''cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' If the EPA Administrator makes a positive endangerment finding, section 202(a) states that EPA ''shall by regulation prescribe * * * standards applicable to the emission of'' the air pollutant with respect to which the positive finding was made.

The Supreme Court stated that it did not ''reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding.'' Instead, the Court said that when exercising the ''judgment'' called for by section 202(a) and in deciding how and when to take any regulatory action, ''EPA must ground its reasons for action or inaction in the statute.''

As a result, and based on the text of section 202(a) of the Clean Air Act, any EPA ''endangerment'' finding must address a number of issues that involve interpretation of statutory terms and the application of technical or scientific data and judgment. For example, an endangerment determination must involve, among other things, a decision about the meaning of statutory terms including ''reasonably be anticipated to,'' ''cause, or contribute to,'' ''endanger,'' and ''public health or welfare.'' Moreover, because the Act refers to ''air pollutant'' in the singular, presumably EPA should make any endangerment finding as to individual greenhouse gases and not as to all GHGs taken together, but this also is a matter that EPA must address and resolve. There are other issues that must be resolved as well, such as: whether the ''public health and welfare'' should be evaluated with respect to the United States alone or, if foreign impacts can or should or must be addressed as well, what the statutory basis is for doing so and for basing U.S. emissions controls on foreign impacts; what time period in the future is relevant for purposes of determining what is ''reasonably anticipate[d]''; whether and if so how EPA must evaluate any beneficial impacts of GHG emissions in the United States or elsewhere in making an endangerment determination; and whether a particular volume of emissions or a particular effect from such emissions from new motor vehicles must be found before EPA may make a ''cause or contribute'' finding, since the Act explicitly calls for the EPA Administrator to exercise his ''judgment,'' and presumably that judgment involves more than simply a mechanistic calculation that one or more molecules will be emitted.

If EPA were to address these issues and resolve them in favor of a positive endangerment finding under section 202(a) of the Act with respect to one or more greenhouse gases and in favor of regulating GHG emissions from new motor vehicles, then the language similarities of various sections of the CAA likely would require EPA also to regulate GHG emissions from stationary sources. A positive endangerment finding and regulation of GHGs from new motor vehicles likely would immediately trigger the prevention of significant deterioration (PSD) permit program which regulates stationary sources that either emit or have the potential to emit 250 tons per year of a regulated pollutant or, if they are included on the list of source categories, at least 100 tons per year of a regulated pollutant. Because these thresholds are extremely low when considered with respect to GHGs, thousands of new sources likely would be swept into the PSD program necessitating time consuming permitting processes, costly new investments or retrofits to reduce or capture GHG emissions, increasing costs, and creating vast areas of uncertainty for businesses and commercial and residential development.

In addition to the PSD program, it is widely acknowledged that a positive endangerment finding could lead to three potential avenues of stationary source regulation under the CAA: (1) The setting of national ambient air quality standards (NAAQS) under sections 108 and 109; (2) the issuance of new source performance standards (NSPS) under section 111; and/or (3) the listing of one or more greenhouse gases as hazardous air pollutants (HAP) under section 112. Each of these approaches, and their associated deficiencies with respect to GHG emissions and as a method of addressing global climate change, are briefly discussed below.

a. Sections 108–109: NAAQS

Section 108 of the CAA requires EPA to identify and list air pollutants that ''cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.'' For such pollutants, EPA promulgates ''primary'' and ''secondary'' NAAQS. The primary standard is defined as the level which, in the judgment of the EPA Administrator, based on scientific criteria, and allowing for an adequate margin of safety, is requisite to protect the public health. The secondary standard is defined as the level which is requisite to protect the public welfare. Within one year of EPA's promulgation of a new or revised NAAQS, each State must designate its regions as non-attainment, attainment, or unclassifiable. Within three years from the NAAQS promulgation, States are required to adopt and submit to EPA a State implementation plan (SIP) providing for the implementation, maintenance, and enforcement of the NAAQS.

At least three major difficulties would be presented with respect to the issuance by EPA of a NAAQS for one or more greenhouse gases: (1) The determination of what GHG concentration level is requisite to protect public health and welfare; (2) the unique nature of GHGs as pollutants dispersed from sources throughout the world and that have long atmospheric lifetimes; and (3) GHG concentrations in the ambient air are virtually the same throughout the world meaning that they are not higher near major emissions sources than in isolated areas with no industry or major anthropogenic sources of GHG emissions.

While much has been said and written in recent years about the need to reduce greenhouse gas emissions to address climate change, there is far less agreement on the acceptable or appropriate atmospheric concentration level of CO_2 or other GHGs. As the draft states, ''[d]etermining what constitutes 'dangerous anthropogenic interference' is not a purely scientific question; it involves important value judgments regarding what level of climate change may or may not be acceptable.'' While the Department agrees with this statement, the courts have held that when setting a NAAQS, EPA cannot consider important policy factors such as cost of compliance. This limitation inhibits a rational balancing of factors in determining and setting a GHG NAAQS based on the science available, the availability and cost of emission controls, the resulting impact on the U.S. economy, the emissions of other nations, etc.

Unlike most pollutants where local and regional air quality, and local and regional public health and welfare, can be improved by reducing local and regional emissions, GHGs originate around the globe, and are mixed and dispersed such that there is a relatively uniform atmospheric GHG concentration level around the world. There is little or nothing that a single State or region can do that will appreciably alter the atmospheric GHG concentration level in that particular State or region. Thus, it is hard to see how a GHG NAAQS, which required States to take action to reduce their emissions to meet a particular air quality standard, would actually work. A GHG NAAQS standard would put the entire United States in either attainment or non-attainment, and it would be virtually impossible for an individual State to control or reduce GHG concentrations in its area and, thus, to make significant strides towards remaining in or reaching attainment with the NAAQS.

Whatever level EPA might eventually establish as an acceptable NAAQS for one or more GHGs, EPA's setting of such a level would immediately implicate further issues under the NAAQS regime, including the ability of States and localities to meet such a standard. If the GHG NAAQS standard for one or more gases is set at a level below the current atmospheric concentration, the entire country would be in nonattainment. All States then would be required to develop and submit State Implementation Plans (SIPs) that provide for meeting attainment by the specified deadline. And yet, as the draft states, ''it would appear to be an inescapable conclusion that the maximum 10-year horizon for attaining the primary NAAQS is ill-suited to pollutants such as greenhouse gases with long atmospheric residence times * * * [t]he long atmospheric lifetime of * * * greenhouse gases * * * means that atmospheric concentrations will not quickly respond to emissions reduction measures * * * in the absence of substantial cuts in worldwide emissions, worldwide concentrations of greenhouse gases would continue to increase despite any U.S. emission control efforts. Thus, despite active control efforts to meet a NAAQS, the entire United States would remain in nonattainment for an unknown number of years.''

As the draft also recognizes, if the NAAQS standard for GHGs is set at a level above the current atmospheric concentration, the entire country would be in attainment. In a nationwide attainment scenario, the PSD and new source review (NSR) permitting regimes would apply and States would have to submit SIPs for the maintenance of the primary NAAQS and to prevent interference with the maintenance by other States of the NAAQS; tasks, that as applied to GHGs, are entirely superfluous given the inability of any single State to change through its own unilateral action the global or even local concentration level of GHGs.

As the difficult choices and problematic results outlined above demonstrate, the inability of a single State to appreciably change atmospheric GHG concentrations in its own area through its own emission reduction efforts is inconsistent with a fundamental premise of the Clean Air Act and of the NAAQS program—that States and localities are primarily responsible for air pollution control and maintaining air quality, and that State and local governments can impose controls and permitting requirements that will allow the State to maintain or attain air quality standards through its own efforts.

b. Section 111: NSPS

Section 111 of the CAA requires the EPA Administrator to list categories of stationary sources if such sources cause or contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The EPA must then issue new source performance standards (NSPS) for such sources categories. An NSPS reflects the degree of emission limitation achievable through the application of the ''best system of emission reduction'' which the EPA determines has been adequately demonstrated. EPA may consider certain costs and non-air quality health and environmental impact and energy requirements when establishing NSPS. Where EPA also has issued a NAAQS or a section 112 maximum achievable control technology (MACT) standard for a regulated pollutant, NSPS are only issued for new or modified stationary sources. Where no NAAQS has been set and no section 112 MACT standard issued, NSPS are issued for new, modified, and existing stationary sources.

Regulation of GHGs under section 111 presents at least two key difficulties. First, EPA's ability to utilize a market system such as cap and trade has not been confirmed by the courts. EPA's only attempt to establish a cap and trade program under section 111, the ''Clean Air Mercury Rule,'' was vacated by the U.S. Court of Appeals for the District of Columbia Circuit, though on grounds unrelated to EPA's authority to implement such a program under section 111. DOE believes EPA does have that authority, as EPA previously has explained, but there is legal uncertainty about that authority, which makes a GHG market-oriented program under section 111 uncertain.

Second, EPA's regulation of small stationary sources (which account for a third of all stationary source emissions) would require a burdensome and intrusive regulatory mechanism unlike any seen before under the CAA. If EPA were to determine that it cannot feasibly issue permits to and monitor compliance for all of these sources, a section 111 system presumably would cover only large stationary sources, which would place the compliance burden completely on electric generators and large industrial sources, and reduce any overall effect from the GHG control regime.

However, there are questions about whether it would be permissible for EPA to elect not to regulate GHG emissions from small stationary sources. Section 111(b)(1) indicates that the Administrator must list a category of sources if, in his judgment, it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health and welfare. Given the volume of greenhouse gases that are emitted from small stationary sources in the aggregate, it is uncertain whether, if EPA makes a positive endangerment finding for emissions of one or more GHGs from new motor vehicles, EPA could conclude that small stationary sources do not cause ''or contribute significantly'' to air pollution that endangers the public health or welfare. This might well turn on the interpretation and application of the terms in CAA section 202(a), noted above. Regardless, it is uncertain whether, and if so where, EPA could establish a certain GHG emission threshold for determining what sources or source categories are subject to GHG regulations under section 111. What does seem clear is that regulating GHG emissions under section 111 would entail implementation of an enormously complicated, costly, and invasive program.

c. Section 112: HAP

Section 112 contains a list of hazardous air pollutants subject to regulation. A pollutant may be added to the list because of adverse health effects or adverse environmental effects. DOE believes it would be inappropriate for greenhouse gases to be listed as HAPs given, among other things, EPA's acknowledgment that ambient GHG concentrations present no health risks. Nevertheless, if one or more GHGs were listed under section 112, EPA would have to list all categories of ''major sources'' (defined as sources that emit or potentially emit 10 tons per year of any one HAP or 25 tons per year of any combination of HAPs). For each major source category, EPA must then set a maximum available control technology (MACT) standard.

It is entirely unclear at this point what sort of MACT standard would be placed on which sources for purposes of controlling GHG emissions, what such controls would cost, and whether such controls would be effective. However, complying with MACT standards with respect to GHG emission controls likely would place a significant burden on States and localities, manufacturing and industrial facilities, businesses, power plants, and potentially thousands of other sources throughout the United States. As the draft explains, section 112 ''appears to allow EPA little flexibility regarding either the source categories to be regulated or the size of sources to regulate * * * EPA would be required to regulate a very large number of new and existing stationary sources, including smaller sources * * * we believe that small commercial or institutional establishments and facilities with natural gas fired furnaces would exceed this major source threshold; indeed, a large single family residence could exceed this threshold if all appliances consumed natural gas.''

Compliance with the standards under section 112 is required to be immediate for most new sources and within 3–4 years for existing sources. Such a strict timeline would leave little to no time for emission capture and reduction technologies to emerge, develop, and become cost-effective.

d. Effects of CAA Regulation of GHGs on the U.S. Energy Sector

While the Department has general concerns about the portrayal of likely effects of proposals to regulate GHGs under the CAA on all sectors of the U.S. economy, DOE is particularly concerned about the effects of such regulation on the energy sector. The effects of broad based, economy-wide regulation of GHGs under the CAA would have significant adverse effects on U.S. energy supplies, energy reliability, and energy security.

Coal is used to generate about half of the U.S. electricity supply today, and the Energy Information Administration (EIA) projects this trend to continue through 2030. (EIA AEO 2008, at 68) At the electricity generating plant itself, conventional coal-fired power stations produce roughly twice as much carbon dioxide as a natural gas fired power station per unit of electricity delivered. Given this reality, the effect of regulating emissions of GHGs from stationary sources under the CAA could force a drastic shift in the U.S. power sector. As Congressman John D. Dingell, Chairman of the U.S. House of Representatives Committee on Energy and Commerce, explained in a statement issued on April 8, 2008:

> ''As we move closer to developing policies to limit and reduce emissions, we must be mindful of the impact these policies have on the price of all energy commodities, particularly natural gas. What happens if efforts to expand nuclear power production and cost-effectively deploy carbon capture and storage for coal-fired generation are not successful? You know the answer. We will drive generation to natural gas, which will dramatically increase its price tag. We don't have to look too far in the past to see the detrimental effect that high natural gas prices can have on the chemical industry, the fertilizer industry, and others to know that we must be conscious of this potential consequence.''

Chairman Dingell's view is supported by studies of the climate bill recently considered by the United States Senate. EIA's analysis of the Lieberman-Warner bill stated that, under that bill, and without widespread availability of carbon capture and storage (CCS) technology, natural gas generation would almost double by 2030. See *Energy Information Administration, Energy Market and Economic Impacts of S. 2191, the Lieberman-Warner Climate Security Act of 2007* at 25.[4]

If CAA regulation of GHG emissions from stationary sources forces or encourages a continued move toward natural gas fired electric generating units, there will be significantly increased demand for natural gas. Given the limitations on domestic supplies, including the restrictions currently placed on the production of natural gas from public lands or from areas on the Outer Continental Shelf, much of the additional natural gas needed likely would have to come from abroad in the form of liquefied natural gas (LNG). This LNG would have to be purchased at world prices, currently substantially higher than domestic natural gas prices and generally tied to oil prices (crude or product). To put this into perspective, natural gas closed on June 27, 2008, at about $13.20/mcf for August delivery, about twice as high as last year at this time, despite increasing domestic natural gas production. The reason is that unlike last year, the U.S. has been able to import very little LNG this year, even at these relatively high domestic prices. United States inventories of natural gas in storage currently are about 3% below the five year average, and are 16% below last year at this time. Among other effects, a large policy-forced shift towards increased reliance on imported LNG would raise energy security and economic concerns by raising domestic prices for consumers (including electricity prices) and increasing U.S. reliance on foreign sources of energy.

In order for coal to remain a viable technology option to help meet the world's growing energy demand while at the same time not addressing GHG emissions, CCS technologies must be developed and widely deployed. While off-the-shelf capture technologies are available for coal power plant applications, current technologies are too costly for wide scale deployment for both new plant construction and retrofit of the existing fleet of coal-fired power plants. DOE studies (e.g., DOE/NETL Report: ''Cost and Performance Baseline for Fossil Energy Plants,'' May 2007) show that capturing and sequestering CO_2 with today's technology is expensive, resulting in electricity cost increases on the order of 30%–90% above the cost of electricity produced from new coal plants built without CCS.

The impact of a policy that requires more production of electricity from natural gas will be felt not just in the United States but in worldwide efforts to reduce GHG emissions. Unless U.S. policy supports rapid development of CCS technologies to the point that they are economically deployable (i.e., companies are not forced to switch to natural gas fired electric generating facilities), CCS will not be installed as early as possible in the China or other developing nations. In a global climate sense, most of the benefit from new technology installation will come from the developing countries, and much of the international benefit would come from providing countries like China and India with reasonable-cost CCS options for development of their massive coal resources, on which we believe they will continue to rely.

III. Energy Policy Considerations for Addressing Climate Change

The Department is concerned that the draft does not properly acknowledge collateral effects of using CAA regulation to address global climate change, particularly in the absence of a regime that actually will effectively address global climate change by addressing global GHG emissions. DOE strongly supports efforts to reduce GHG emissions by advancing technology and implementing policies that lower emissions, but doing so in a manner that is conscious of and that increases, rather than decreases, U.S. energy security and economic security. With these goals in mind, DOE believes policymakers and the public should be mindful of the considerations briefly described below as the United States seeks to effectively address the challenge of global climate change.

Secretary Bodman has stated that ''improving our energy security and addressing global climate change are among the most pressing challenges of our time.'' This is particularly true in light of the estimate by the International Energy Agency that the world's primary energy needs will grow by over 50% by 2030.

In order to address these challenges simultaneously and effectively, the United States and other countries must make pervasive and long-term changes. Just as the current energy and environmental situation did not develop

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[4] DOE's Energy Information Administration (EIA) prepared an analysis of the proposed Lieberman-Warner Climate Security Act of 2007 and projected that if new nuclear, renewable and fossil plans with carbon capture and sequestration are not developed and deployed in a time frame consistent with emissions reduction requirements, there would be increased natural gas use to offset reductions in coal generation, resulting in markedly higher delivered prices of natural gas. *See Energy Market and Economic Impacts of S. 2191, the Lieberman-Warner Climate Security Act of 2007* (EIA, April 2008) EIA estimated price increases from 9.8 cents per kilowatthour in 2020 to 14.5 cents per kilowatthour in 2030, ranging from 11 to 64 percent higher by 2030. *Id., p. 27, Figure 16.* EPA's analysis of the proposed legislation similarly projected electricity prices to increase 44% in 2030 and 26% in 2050 assuming the growth of nuclear, biomass or carbon capture and storage technologies. *See EPA Analysis of the Lieberman-Warner Climate Security Act of 2008* (March 14, 2008), pp. 3, 57. If the growth of nuclear, biomass, or carbon capture and storage technologies was constrained, EPA projected that electricity prices in 2030 would be 79% higher and 2050 prices would be 98% higher than the reference scenario prices. Other analyses of the legislation also projected substantial increases in energy costs for consumers. *See, e.g. Analysis of the Lieberman-Warner Climate Security Act (S. 2191) Using the National Energy Modeling* System (A Report by the American Council for Capital Formation and the National Associate of Manufacturers, conducted by Science Applications International Corporation (SAIC))(study finding increases in energy prices for residential consumers by 26% to 36% in 2020, and 108% to 146% in 2030 for natural gas, and 28% to 33% in 2020, and 101% to 129% in 2030 for electricity). Further, in its analysis o the bill the Congressional Budge Office estimated that costs of private sector mandates associated with the legislation would amount to more than $90 billion each year during the 2012–2016 period, most of which cost would ultimately be passed on to consumers in the form of higher prices for energy and energy-intensive goods and services. *See Congressional Budget Office Cost Estimate*, S. 2191 (April 10, 2008), pp. 2, 19.

overnight, neither can these challenges be addressed and resolved immediately.

To ensure that we both improve energy security and reduce GHG emissions, rather than address one at significant cost to the other, DOE believes that a number of actions must be taken. None of these actions is sufficient in itself, and none of these actions can be pursued to the exclusion of the others.

Specifically, the United States and other nations must: Bring more renewable energy online; aggressively deploy alternative fuels; develop and use traditional hydrocarbon resources, and do so in ways that are clean and efficient; expand access to safe and emissions-free nuclear power, while responsibly managing spent nuclear fuel and reducing proliferation risks; and significantly improve the efficiency of how we use energy. In all of these things, the Department believes that technological innovation and advancement is the key to unlocking the future of abundant clean energy and lower GHG emissions. Therefore, this innovation and advancement—through government funding, private investment, and public policies that promote both of these—should be the cornerstone of any plan to combat global climate change.

In recent years, DOE has invested billions of dollars to advance the development of technologies that advance these objectives. For example, in 2007 DOE funded the creation of three cutting-edge bioenergy research facilities. These facilities, which are already showing progress, will seek to advance the production of biofuels that have significant potential for both increasing the Nation's energy security and reducing GHG emissions. Since the start of 2007, DOE has invested well over $1 billion to spur the growth of a robust, sustainable biofuels industry in the United States.

DOE also has promoted technological advancement and deployment in other renewable energy areas such as wind, solar and geothermal power, and these advancements and policies are producing results. For example, in 2007, U.S. cumulative wind energy capacity reached 16,818 megawatts—more than 5,000 megawatts of wind generation were installed in 2007 alone. The United States has had the fastest growing wind power capacity in the world for the last three years in a row. In addition, DOE recently issued a solicitation offering up to $10 billion in federal loan guarantees, under the program authorized by Title XVII of the Energy Policy Act of 2005, to incentivize the commercial deployment of new or significantly improved technologies in projects that will avoid, reduce or sequester emissions of GHGs or other air pollutants.

DOE strongly believes that nuclear power must play an important role in any effective program to address global climate change. Indeed, we believe that no serious effort to effectively control GHG emissions and address climate change can exclude the advancement and development of nuclear power. DOE continues to seek advancements in nuclear power technology, in the licensing of new nuclear power facilities, and in responsibly disposing of spent nuclear fuel. With respect to new nuclear power plants, DOE has put in place a program to provide risk insurance for the developers of the first new facilities, and recently issued a solicitation offering up to $18.5 billion in federal loan guarantees for new nuclear power plants.

Significant advancements have been made in recent years toward the development of new nuclear facilities. There now are pending at the Nuclear Regulatory Commission several applications, all of which have been filed in 2007 or 2008, to license new nuclear generating facilities. DOE views the filing of these applications and the interest in licensing and building new nuclear power facilities as very positive developments from the perspectives of the Nation's electric reliability and energy security, as well as the effort to control greenhouse gas emissions. But there still is much to be done, and it will take a sustained effort both by the private sector and by federal, State and local governments, to ensure that these facilities are licensed, built and placed into service.

As noted above, DOE believes that coal can and must play an important role in this Nation's energy future. Moreover, regardless what decisions about coal U.S. policy officials may wish to make, it seems clear that coal will continue to be used by other countries to generate electricity for decades to come. It has been noted that China is building new coal power plant capacity at the incredible rate of one per week. As a result, it is critically important that we develop and deploy cost-effective carbon capture and sequestration technology, both to ensure that we can take advantage of significant energy resources available in the United States, but also to help enable the control of emissions in other countries as well.

DOE believes that cost effective CCS technology must be developed over the next 10–15 years that could be deployed on new plants built to meet increasing demand and to replace retiring capital stock, and retrofitted on existing plants with substantial remaining plant life. DOE is helping to develop technologies to capture, purify, and store CO_2 in order to reduce GHG emissions without significant adverse effects on energy use or on economic growth. DOE's primary CCS research and development objectives are: (1) Lowering the cost and energy penalty associated with CO_2 capture from large point sources; and (2) improving the understanding of factors affecting CO_2 storage permanence, capacity, and safety in geologic formations and terrestrial ecosystems.

Once these objectives are met, new and existing power plants and fuel processing facilities in the U.S. and around the world will have the potential to deploy CO_2 capture technologies. Roughly one third of the United States' carbon emissions come from power plants and other large point sources. To stabilize and ultimately reduce atmospheric concentrations of CO_2, it will be necessary to employ carbon sequestration—carbon capture, separation and storage or reuse. The availability of advanced coal-fired power plants with CCS to provide clean, affordable energy is essential for the prosperity and security of the United States.

The DOE carbon sequestration program goal is to develop at R&D scale by 2012, fossil fuel conversion systems that offer 90 percent CO_2 capture with 99 percent storage permanence at less than a 10 percent increase in the cost of energy services from new plants. For retrofits of existing facilities, the task will be much harder, and the penalties in terms of increased cost of power production from those plants likely will be much higher. We expect that these integrated systems for new plants will be available for full commercial deployment—that is, will have completed the demonstration and early deployment phase—in the 2025 timeframe. Of course, there are inherent uncertainties in these projections and long-term research, development, demonstration and deployment goals.

In line with the Department's CCS R&D goals, DOE is working with regional carbon sequestration partnerships to facilitate the development of the infrastructure and knowledge base needed to place carbon sequestration technologies on the path to commercialization. In addition, DOE recently restructured its FutureGen program to accelerate the near-term deployment of advanced clean coal technology by equipping new integrated gasification combined cycle (IGCC) or other clean coal commercial power plants with CCS technology. By funding multiple projects, the restructured FutureGen is expected to at least double the amount of CO_2 sequestered compared to the concept that previously had been announced in 2003. The restructured FutureGen approach also will focus on the challenges associated with avoidance and reduction of carbon emissions and criteria pollutants through sequestration.

In order to reduce the demand on our power sector and the associated emissions of GHGs and other pollutants, we must continue to support expanded efforts to make our society more efficient, from major power plants to residential homes. DOE has helped lead this effort with, among other things, its Energy Star program, a government-backed joint effort with EPA to establish voluntary efficiency standards that help businesses and individuals protect the environment and save money through greater energy efficiency. By issuing higher efficiency standards for an increasing number of products, the Energy Star program helps consumers make fully-informed and energy-conscious decisions that result in reduced emissions of GHGs and other pollutants. Last year alone, with the help of the Energy Star program, American consumers saved enough energy to power 10 million homes and avoid GHG emissions equivalent to the emissions from 12 million cars—all while saving $6 billion in energy costs.

IV. Conclusion

The Department believes the draft does not address and explain in clear, understandable terms the extraordinary costs, burdens and other adverse consequences, and the potentially limited benefits, of the United States unilaterally using the Clean Air Act to regulate GHG emissions. The draft, while presenting useful analysis, seems to make a case for the CAA being the proper vehicle to meaningfully combat global climate change, but we believe it understates the potential costs and collateral adverse effects of attempting to regulate GHG emissions and address climate change through a regulatory scheme that is forced into the Clean Air Act's legal and regulatory mold.

Any effective and workable approach to controlling GHG emissions and addressing global climate change should not simply consist of a unilateral and extraordinarily burdensome CAA regulatory program that is placed on top of the U.S. economy with all other existing mandates, restrictions, etc. simply remaining in place and the Government taking the position that U.S. energy security and indeed the American economy will just have to live with whatever results the GHG control program produces. Rather, the Nation can only effectively address GHG emissions and global climate change in coordination with other countries, and by addressing how to regulate GHG emissions while considering the effect of doing so on the Nation's energy and economic security. Considering and developing such a comprehensive approach obviously will be very difficult. But what seems clear is that it would be better than the alternative, if the alternative is unilaterally proceeding with the enormously burdensome, complex and costly regulatory program under the Clean Air Act discussed in the draft, which in the end might not even produce the desired climate change benefits.

U.S. Department of Commerce

Analysis of Draft Advanced Notice of Proposed Rulemaking

''Regulating Greenhouse Gas Emissions Under the Clean Air Act''

Overview: This analysis reviews some of the implications of regulating greenhouse gas (GHG) emissions under the Clean Air Act (CAA) as outlined in the draft Advance Notice of Proposed Rulemaking submitted to the Office of Management and Budget on June 17, 2008 (the draft). The Department of Commerce's fundamental concern with the draft's approach to using the CAA to regulate GHGs is that it would impose significant costs on U.S. workers, consumers, and producers and harm U.S. competitiveness without necessarily producing meaningful reductions in global GHG emissions.

Impact on U.S. Competitiveness and Manufacturing: The draft states that competitiveness is an important policy consideration in assessing the application of CAA authorities to GHG emissions. It also acknowledges the potential unintended consequences of domestic GHG regulation, noting ''[t]he concern that if domestic firms faced significantly higher costs due to regulation, and foreign firms remained unregulated, this could result in price changes that shift emissions, and possibly some production capacity, from the U.S. to other countries.'' [5] This is a real issue for any domestic regulation implemented without an international agreement involving the world's major emitters.

However, the draft does not detail the shift in global emissions that is currently taking place. As the chart below shows, the emissions of countries outside of the Organization of Economic Cooperation and Development (OECD) already exceed those of OECD countries. By 2030, non-OECD emissions are projected to be 72 percent higher than those of their OECD counterparts.[6]

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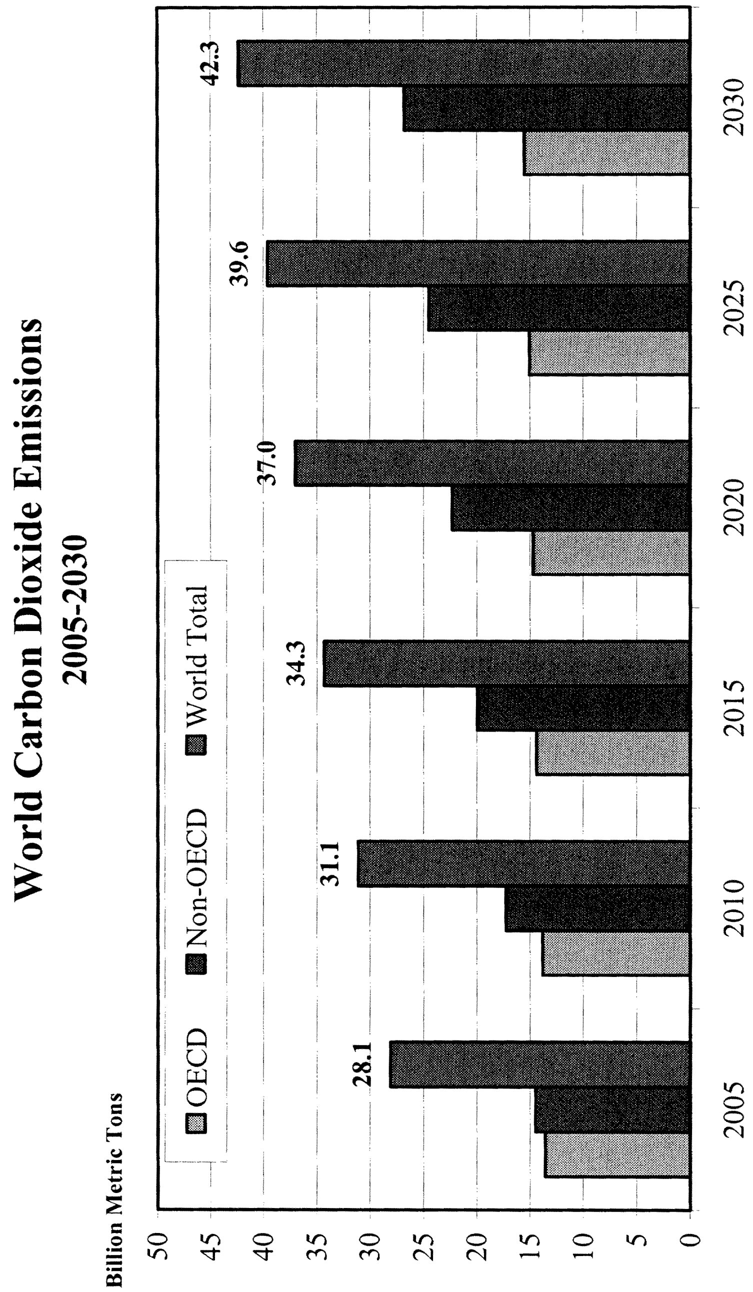
[5] EPA draft, pg. 36.

[6] EIA International Energy Outlook 2008, *http://www.eia.doe.gov/oiaf/ieo/highlights.html.*



Source: Energy Informatin Administration, World Energy Projections Plus (2008).

Any climate change regulation must take this trend into account. Greenhouse gas emissions are a global phenomenon, and, as documented in the draft, require reductions around the world in order to achieve lower concentrations in the atmosphere. However, the costs of emissions reductions are generally localized and often borne by the specific geographic area making the reductions. As a result, it is likely that the U.S. could experience significant harm to its international competitiveness if GHGs were regulated under the CAA, while at the same time major sources of emissions would continue unabated absent an international agreement.

Because the draft does not specify an emissions target level, the implications of national regulation for the U.S. economy as a whole and for energy price-sensitive sectors in particular are difficult to forecast. However, recent analysis of emissions targets similar to those cited in the draft provides a guide to the estimated level of impacts.

In April 2008, the Energy Information Administration (EIA) released an analysis of legislation that set emission reduction targets of 30 percent below 2005 levels by 2030 and 70 percent below 2005 levels by 2050. The EIA estimated that in the absence of international offsets and with limited development of alternatives, achieving those emission targets would reduce manufacturing employment by 10 percent below currently projected levels in 2030. Under the same scenario, the EIA estimate indicated the emission targets would reduce the output of key energy-intensive manufacturing industries, such as food, paper, glass, cement, steel, and aluminum, by 10 percent and the output of non-energy intensive manufacturing industries by nine percent below currently projected levels in 2030.[7]

The European Union's experience with implementation of its cap-and-

[7] Energy Market and Economic Impacts of S. 2191, Figure 28 & 29, *http://www.eia.doe.gov/oiaf/servicerpt/s2191/economic.html.*

trade system is also instructive from a competitiveness standpoint. Key energy intensive industries in Europe have raised concerns about the competitiveness impacts of the emissions trading system (ETS), arguing that the ETS would force them to relocate outside of Europe. EU leaders have responded to these concerns by considering the possibility of awarding free emissions permits to certain industries, provided the industries also agreed to reduce emissions.[8] This illustrates one of the challenges of crafting an effective national or regional solution to a global problem.

International Trade: In order to address the concern that GHG regulation in the United States will lead to emissions leakage and movement of certain sectors to countries without strict carbon regulations, the draft requests comment on ''trade-related policies such as import tariffs on carbon or energy content, export subsidies, or requirements for importers to submit allowances to cover the carbon content of certain products.'' [9]

Applying tariffs to imports from countries without carbon regulations would have a number of significant repercussions. In addition to exposing the United States to World Trade Organization challenges by our trading partners, unilateral U.S. carbon tariffs could spark retaliatory measures against U.S. exporters, the brunt of which would fall on U.S. workers, consumers, and businesses. For example, a World Bank study found that carbon tariffs applied to U.S. exports to Europe ''could result in a loss of about 7 percent in U.S. exports to the EU. The energy intensive industries, such as steel and cement * * * could suffer up to a 30 percent loss.'' [10]

Moreover, carbon tariffs would actively undermine existing U.S. trade policy. The U.S. Government has consistently advocated for reducing tariffs, non-tariff barriers, and export subsidies. Introducing new tariffs or export subsidies for carbon or energy content would undermine those efforts with respect to clean energy technologies specifically and U.S. goods and services more broadly, as well as invite other countries to expand their use of tariffs and subsidies to offset costs created by domestic regulations.

Two examples of U.S. efforts to reduce tariffs or enhance exports in this area: The United States Trade Representative is actively engaged in trade talks to specifically reduce tariffs on environmental technologies, which will lower their costs and encourage adoption, while the Department of Commerce's International Trade Administration is currently planning its third ''Clean Energy'' trade mission to China and India focused on opening these rapidly developing economies to U.S exporters of state-of-the-art clean technologies. Rather than raising trade barriers, the U.S. Government should continue to advocate for the deployment of clean energy technologies through trade as a way to address global GHG emissions

The issue of emissions leakage and the potential erosion of the U.S. industrial base are real concerns with any domestic GHG regulation proposal outside of an international framework. Accordingly, the proper way to address this concern is through an international agreement that includes emission reduction commitments from all the major emitting economies, not by unilaterally erecting higher barriers to trade.

Realistic Goals for Reducing Carbon Emissions: Establishing a realistic goal of emissions reduction is an essential aspect of designing policies to respond to climate change. Although the draft does not ''make any judgment regarding what an appropriate [greenhouse gas] stabilization goal may be,'' the document cites, as an example, the Intergovernmental Panel on Climate Change's projection that global CO2 emissions reductions of up to 60 percent from 2000 levels by 2050 are necessary to stabilize global temperatures slightly above pre-industrial levels.[11]

To provide context, it is useful to note that a 60 percent reduction in U.S. emissions from 2000 levels would result in emissions levels that were last produced in the United States during the 1950s (see chart on next page). In 1950, the population in the United States was 151 million people—about half the current size—and the Gross Domestic Product was $293 billion.[12] Without the emergence of technologies that dramatically alter the amount of energy necessary for U.S. economic output, the reduction of energy usage necessary to achieve this goal would have significant consequences for the U.S. economy.

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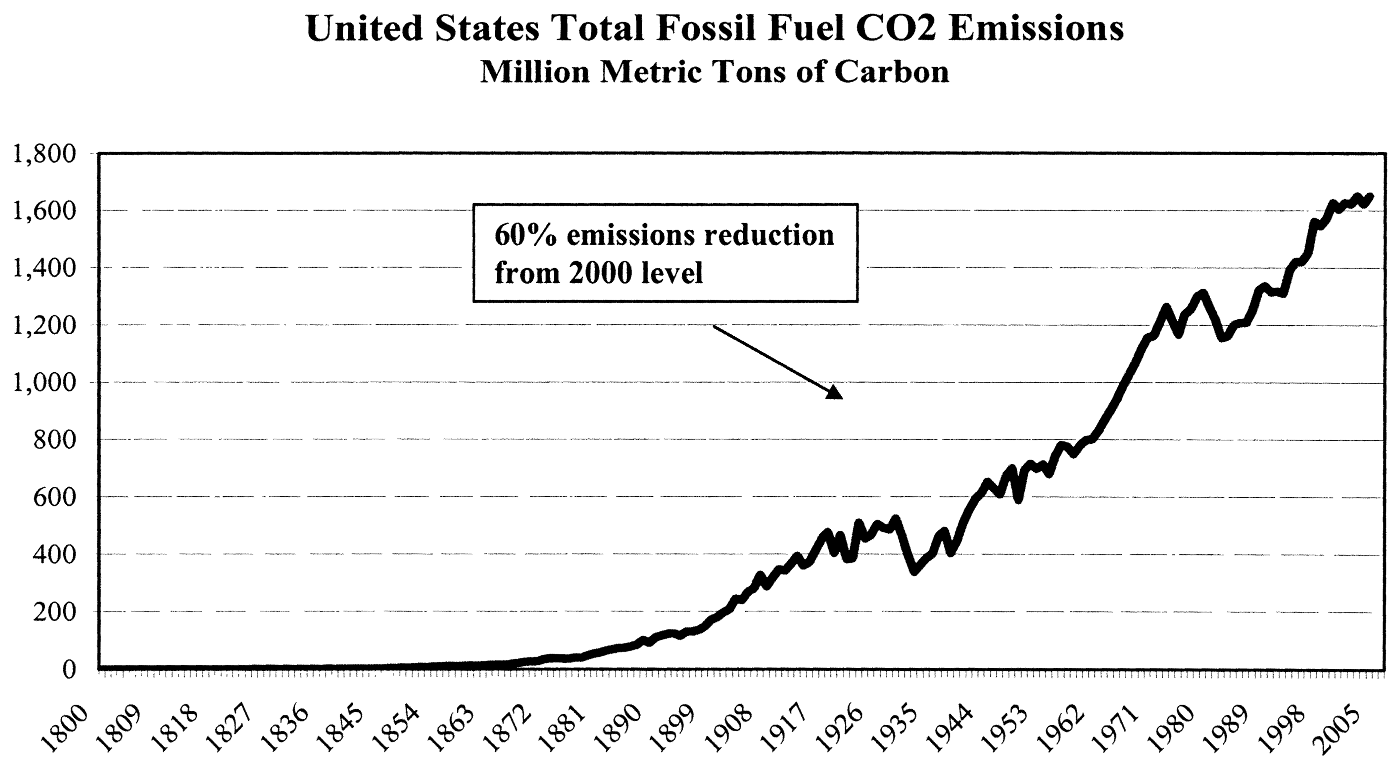
[8] *Financial Times,* ''Brussels softens line on carbon permits,'' Andrew Bounds, Jan. 22, 2008.

[9] EPA draft, pg. 37.

[10] The World Bank, International Trade and Climate Change: Economic, Legal, and Institutional Perspectives, 2008, pg. 12.

[11] EPA draft, pg. 14.

[12] U.S. Census Bureau, 1950 Decennial Census; Bureau of Economic Analysis, National Income and Product Accounts Table.



Source: Carbon Dioxide Information Analysis Center, Oak Ridge National Laboratory, August 17, 2007 (http://cdiac.ornl.gov/ftp/trends/emissions/usa.dat).

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Moreover, as the draft acknowledges, initial emissions reductions under the CAA or other mechanism "may range from only [a] few percent to 17% or more in some cases. Clearly, more fundamental technological changes will be needed to achieve deeper reductions in stationary source GHG emissions over time." [13] But the inability, at this time, to identify either a realistic emissions target or the technical feasibility of achieving various levels of reduction is one of the major flaws of using the draft to assess policy changes of this magnitude.

The draft also notes that "[a]n economy-wide, market-oriented environmental regulation has never been implemented before in the U.S." [14] This point is worth underscoring: The CAA has never been applied to every sector in the U.S. economy. Instead, the CAA is generally applied to specific sectors (such as the power sector) or sources of emissions, and it has included initiatives to address regional and multi-state air quality issues. While these examples clearly provide valuable experience in addressing air pollution issues across state boundaries, using the CAA to regulate GHGs is significantly more ambitious in scope than anything previously attempted under the CAA.

Accountability and Public Input: The draft contemplates a dramatic regulatory expansion under the CAA. However, climate policies of this magnitude are best addressed through legislative debate and scrutiny. Examining these issues in the legislative context would ensure that citizens, through their elected representatives, have ample opportunity to make their views known and to ensure accountability for the decisions that are made.

Economic Implications of Applying CAA Authorities: The draft noted numerous issues of economic significance in analyzing the potential application of the CAA to stationary sources of GHGs. The Department of Commerce highlights below some of the most important issues raised in the draft that could impact U.S. competitiveness, innovation, and job creation.

Compliance Costs of Multiple State Regulations Under the CAA: The draft describes the various authorities under the CAA that could be applied to GHGs. One such mechanism involves the development of individual state implementations plans (SIPs) in order to meet a national GHG emissions reduction standard. As the draft notes, "[t]he SIP development process, because it relies in large part on individual states, is not designed to result in a uniform national program of emission controls." [15] The draft also raises the potential implications of this approach: "[u]nder the traditional SIP approach, emissions controls on specific source categories would flow from independent state-level decisions, and could result in a patchwork of regulations requiring different types and levels of controls in different states." [16] If this were the result, it could undermine the benefit of having a national standard and significantly raise compliance costs. The implications of this approach should be examined further.

Viability of Technological Alternatives: The draft notes that some of the authorities in the CAA could impose requirements to use technology that is not commercially viable. For example, when discussing Standards of Performance for New and Existing Sources, the draft notes that "the systems on which the standard is based need only be 'adequately demonstrated' in EPA's view * * * The systems, and corresponding emission rates, need not be actually in use or achieved in

[13] EPA draft, pg. 209.

[14] EPA draft, pg. 32.

[15] EPA draft, pg. 181.

[16] EPA draft, pg. 187.

practice at potentially regulated sources or even at a commercial scale.'' [17] Similarly, in examining the potential application of the New Source Review program to nonattainment areas, the draft outlines the program's required use of the Lowest Available Emissions Rate (LAER) technology which ''does not allow consideration of the costs, competitiveness effects, or other related factors associated with the technology * * * New and modified sources would be required to apply the new technology even if it is a very expensive technology that may not necessarily have been developed for widespread application at numerous smaller sources, and even if a relatively small emissions improvement came with significant additional cost.'' [18]

If CAA requirements such as these were used to regulate GHGs, it would impose significant costs on those required to adopt the technology.

Expanding CAA Regulation to Cover Small Businesses and Non-Profits: The draft notes that the use of some CAA authorities could extend regulation to small and previously unregulated emissions sources. For example, the draft states that the use of one authority under the CAA could result in the regulation of ''small commercial or institutional establishments and facilities with natural gas-fired furnaces.'' [19] This could include large single family homes, small businesses, schools, or hospitals heated by natural gas. If the CAA was applied in ways that extended it beyond those traditionally regulated under the Act, it could have significant economic impacts, and the costs of such an application should be further analyzed. To put this potential expansion in context, in 2003 there were 2.4 million commercial non-mall buildings in the United States that used natural gas, and an estimated 54 percent of these buildings were larger than 5,000 square feet.[20] According to the EIA's 2003 Commercial Building Energy Consumption Survey, a building between 5,001 to 10,000 square feet consumes 408,000 cubic feet of natural gas per year.[21] Based on preliminary calculations using the EPA's Greenhouse Gas Equivalencies Calculator, this translates into annual CO_2 emissions of 21 metric tons, which would exceed the allowable threshold under one provision of the CAA.[22]

The table below taken from the EIA's 2003 Commercial Building Energy Consumption Survey shows the number and size of U.S. buildings, providing more detail on the type of structures that could be regulated if the CAA was applied to GHGs. Based on the estimate of 21 metric tons of annual emissions from a building 5,000–10,000 square feet in size, it is likely that schools, churches, hospitals, hotels, and police stations heated by natural gas could be subject to the CAA. Clearly, the costs and benefits of such an approach should be examined in greater detail.

NON-MALL BUILDINGS USING NATURAL GAS

[Number and Floorspace by Principal Building Activity, 2003]

	Number of buildings (thousand)	Total floorspace (million sq. ft.)	Mean square feet per building (thousand)
All Buildings	2,391	43,468	18.2
Education	213	7,045	33.1
Food Sales	98	747	7.6
Food Service	226	1,396	6.2
Health Care	72	2,544	35.5
Inpatient	7	1,805	257.0
Outpatient	65	739	11.4
Lodging	86	4,256	49.7
Mercantile	245	2,866	11.7
Office	488	8,208	16.8
Public Assembly	146	2,723	18.6
Public Order and Safety	36	637	17.7
Religious Worship	220	2,629	11.9
Service	281	2,496	8.9
Warehouse and Storage	187	5,494	29.4
Other	45	1,252	27.9
Vacant	49	1,176	24.2

Source: from Energy Information Administration, 2003 Commercial Buildings Energy Consumption Survey, Table C23. (*http://www.eia.doe.gov/emeu/cbecs/cbecs2003/detailed_tables_2003/2003set11/2003excel/c23.xls)*

Cost of CAA Permitting: As the draft states, ''the mass emissions [of CO_2] from many source types are orders of magnitude greater than for currently regulated pollutants,'' which could result in the application of the CAA's preconstruction permitting requirements for modification or new construction to large office buildings, hotels, apartment building and large retail facilities.[23] The draft also notes the potential time impacts (i.e., the number of months necessary to receive a CAA permit) of applying new permit requirements to projects and buildings like those noted above that were not previously subject to the CAA.[24] The potential economic costs of applying the CAA permitting regimes to these areas of the economy, such as small businesses and commercial development, merit a complete assessment of the costs and benefits of such an approach.

Conclusion: Climate change presents real challenges that must be addressed through focused public policy

[17] EPA draft, pg. 196.

[18] EPA draft, pg. 232.

[19] EPA draft, pg. 215.

[20] Energy Information Agency, 2003 Commercial Buildings Energy Consumption Survey-Overview of Commercial Buildings Characteristics, Table C23.

[21] 2003 Commercial Buildings Energy Consumption Survey.

[22] Calculation done by converting cubic feet of gas consumed to therms, and the number of therms then inserted into the EPA calculator. According to the EPA draft (pg. 214): If GHGs were listed as a Hazardous Air Pollutant (HAP) under the CAA, the HAP standard's ''major source thresholds of 10 tons for a single HAP and 25 for any combination of HAP would mean that very small GHG emitters would be considered major sources.''

[23] EPA draft, pg. 224, 225.

[24] EPA draft, pg. 227.

responses. However, the draft raises serious concerns about the use of the CAA to address GHG emissions. The CAA is designed to reduce the concentration of pollutants, most of which have a limited lifetime in the air, while climate change is caused by GHG emissions that linger in the atmosphere for years. The CAA uses regulations that are often implemented at the state and regional level, while climate change is a global phenomenon. The CAA is designed to regulate major sources of traditional pollutants, but applying those the standards to GHGs could result in Clean Air Act regulation of small businesses, schools, hospitals, and churches.

Using the CAA to address climate change would likely have significant economic consequences for the United States. Regulation of GHG emissions through the CAA would mean that the United States would embrace emissions reductions outside of an international agreement with the world's major emitters. This would put U.S. firms at a competitive disadvantage by raising their input costs compared to foreign competitors, likely resulting in emissions leakage outside of the United States and energy-intensive firms relocating to less regulated countries. Such an outcome would not be beneficial to the environment or the U.S. economy.

Department of Agriculture

Americans enjoy the safest, most abundant, and most affordable food supply in the world. Our farmers are extraordinarily productive, using technology and good management practices to sustain increased yields that keep up with growing populations, and they are good stewards of the land they depend upon for their livelihoods. Because of their care and ingenuity, the United States is projecting an agricultural trade surplus of $30 billion in 2008.

Unfortunately, the approach suggested by the Environmental Protection Agency (''EPA'') staff's draft Advance Notice of Proposed Rulemaking ''Regulating Greenhouse Gas Emissions under the Clean Air Act,'' which was submitted to the Office of Management and Budget on June 17, 2008 (''June 17 draft'' or ''draft ANPR''), threatens to undermine this landscape. If EPA were to exercise a full suite of the Clean Air Act (''CAA'') regulatory programs outlined in the draft ANPR, we believe that input costs and regulatory burden would increase significantly, driving up the price of food and driving down the domestic supply. Additionally, the draft ANPR does not sufficiently address the promise of carbon capture and sequestration, and how a Clean Air Act regulatory framework could address these issues.

Input Costs

Two of the more significant components of consumer food prices are energy and transportation costs, and as these costs rise, they will ultimately be passed on to consumers in the form of higher food prices. As the past several months have demonstrated to all Americans, food prices are highly sensitive to increased energy and transportation costs. From May 2007 to May 2008, the price of crude oil has almost doubled, and the price consumers in the United States paid for food has increased by 5.1%.

We do not attempt here to address the effects on energy and transportation costs that would likely flow from a Clean Air Act approach to regulating greenhouse gases. The expert agencies—the Department of Energy and the Department of Transportation—have each included their own brief assessments of such effects. Our analysis begins with the assumption that these input costs would be borne by agricultural producers.

United States commercial agriculture is a highly mechanized industry. At every stage—field preparation, planting, fertilization, irrigation, harvesting, processing, and transportation to market—modern agriculture is dependent on technically complex machinery, all of which consume energy. Direct energy consumption in the agricultural sector includes use of gas, diesel, liquid petroleum, natural gas, and electricity. In addition, agricultural production relies on energy indirectly through the use of inputs such as nitrogen fertilizer, which have a significant energy component associated with their production.

Crop and livestock producers have been seeing much higher input prices this year. From June 2007 to June 2008, the prices paid by farmers for fertilizer are up 77%, and the prices paid for fuels have risen 61%. The prices paid by farmers for diesel fuel alone have increased by 72% over the past year. In practical terms, these figures mean that it is becoming far more costly for the producer to farm. Currently, USDA forecasts that expenditures for fertilizers and lime, petroleum fuel and oils, and electricity will exceed $37 billion in 2008, up 15% from 2007.

Depending on the extent to which the Clean Air Act puts further pressure on energy prices, input costs for indispensible items such as fuel, feed, fertilizer, manufactured products, and electricity will continue to rise. A study conducted by USDA's Economic Research Service (Amber Waves, April 2006) found the impact of energy cost changes on producers depends on both overall energy expenditures and, more importantly, energy's share of production costs, with the potential impacts on farm profits from changes in energy prices greatest for feed grain and wheat producers. The study also found that variation in the regional distribution of energy input costs suggests that changes in energy prices would most affect producers in regions where irrigation is indispensable for crop production. Less use of irrigation could mean fewer planted acres or lower crop yields, resulting in a loss of production. In addition to potential financial difficulties, farmers fear that future tillage practices could be mandated and livestock methane management regulated.

However, the impact of higher energy prices on farmers is only part of the story. Only 19% of what consumers paid for food in 2006 went to the farmer for raw food inputs. The remaining 81% covered the cost of transforming these inputs into food products and transporting them to the grocery store shelf. Of every $1 spent on U.S.-grown foods, 3.5 cents went toward the costs of electricity, natural gas, and other fuels used in food processing, wholesaling, retailing, and food service establishments. An additional 4 cents went toward transportation costs. This suggests that for every 10 percent increase in energy costs, retail food prices could increase by as much as 0.75 percent if fully passed onto consumers. The resulting impact to the consumer of higher energy prices will be much higher grocery bills. More important, however, will be the negative effect on our abundant and affordable food supply.

Regulatory Burden on Agriculture

In its draft ANPR, EPA contemplates regulating agricultural greenhouse gas (GHG) emissions under the three primary CAA programs—National Ambient Air Quality Standards (''NAAQS''), New Source Performance Standards (''NSPS''), or Hazardous Air Pollutant (''HAP'') standards. Like the Act itself, these programs were neither designed for, nor are they suitable to, regulation of greenhouse gases from agricultural sources. If agricultural producers were covered under such complex regulatory schemes, most (except perhaps the largest operations) would be ill-equipped to bear the costly burdens of compliance, and many would likely cease farming altogether.

The two common features of each CAA program are permitting and control requirements:

Permitting: Operators who are subject to Title V permitting requirements—regardless of which CAA program is applicable—are required to obtain a permit in order to operate. These Title V permits are subject to a public notice and comment period and contain detailed requirements for emission estimation, monitoring, reporting, and recordkeeping. Title V permits may also contain control requirements that limit the operation of a facility. If a producer desired, or were compelled by changed circumstances (e.g., changing market demand, weather events, or pest infestation) to modify his operational plans, he would be required to first seek a permit modification from EPA or the State.

If GHG emissions from agricultural sources are regulated under the CAA, numerous farming operations that currently are not subject to the costly and time-consuming Title V permitting process would, for the first time, become covered entities. Even very small agricultural operations would meet a 100-tons-per-year emissions threshold. For example, dairy facilities with over 25 cows, beef cattle operations of over 50 cattle, swine operations with over 200 hogs, and farms with over 500 acres of corn may need to get a Title V permit. It is neither efficient nor practical to require permitting and reporting of GHG emissions from farms of this size. Excluding only the 200,000 largest commercial farms, our agricultural landscape is comprised of 1.9 million farms with an average value of production of $25,589 on 271 acres. These operations simply could not bear the regulatory compliance costs that would be involved.

Control: Unlike traditional point sources of concentrated emissions from chemical or manufacturing industries, agricultural emissions of greenhouse gases are diffuse and most often distributed across large open areas. These emissions are not easily calculated or controlled. Moreover, many of the emissions are the result of natural biological processes that are as old as agriculture itself. For instance, technology does not currently exist to prevent the methane produced by enteric fermentation associated with the digestive processes in cows and the cultivation of rice crops; the nitrous oxide produced from the tillage of soils used to grow crops; and the carbon dioxide produced by soil and animal agricultural respiratory processes. The only means of controlling such emissions would be through limiting production, which would result in decreased food supply and radical changes in human diets.

The NAAQS program establishes national ambient concentration levels without consideration of specific emission sources. The determination of which source is required to achieve emission reductions and how to achieve those reductions is specified in the State Implementation Plans (''SIPs'') developed by each State. Under a NAAQS regulatory program, agricultural sources may need to employ Reasonably Available Control Measures (''RACM'') or, at a minimum, include the use of Reasonably Available Control Technologies (''RACT''). In the past, such control measures were established with a national focus for typical industrial sources. In previously regulated sectors, these control measures and technologies have typically been associated with improved engineering or chemical processes; however, agriculture is primarily dependent upon biological processes which are not readily re-engineered. Given the nature of many agricultural source emissions, RACM and RACT may not exist or may be cost prohibitive.

The NSPS program regulates specific pollutants emitted from industrial categories for new, modified, or reconstructed facilities. EPA, rather than individual States, determines who is regulated, the emission reductions that must be achieved, and the associated control technologies and compliance requirements. Should EPA choose to regulate agriculture under NSPS, control requirements would be established at the national level using a ''one-size-fits-all'' approach. Differences in farming practices make it difficult to comply with this approach, as variability exists between types of operations and between similar operations located in different regions of the United States.

In addition, regulation of the agricultural sector under a NSPS program would likely trigger the added challenge of compliance with the pre-construction permitting process under the Prevention of Significant Deterioration (''PSD'') program. Triggering pre-construction permits could result in a requirement to utilize Best Available Control Technologies (''BACT'') or technologies that achieve the Lowest Available Emission Reductions (''LAER''). Given the state of available control methods for agricultural area sources, compliance with these requirements may not currently be achievable in many instances. Should BACT or LAER technologies exist, the ability to utilize them across the variety of farming operations is questionable, and the costs to employ these technologies would be high since they would be relatively new technologies.

Similar to the NSPS program, the HAP program focuses on industrial categories. EPA must list for regulation all categories of major sources that emit one or more HAP at levels that are very low (i.e., 10 tons per year of a single HAP or 25 tons per year of a combination of HAP). Under a HAP program, EPA can regulate both major sources and smaller (i.e., area) sources. In addition to the Title V permit requirement, this program would result in emission control requirements for all agricultural sources regardless of the size of the operation. These requirements are driven by the best-performing similar sources, with EPA determining the similarity between sources. This approach does not lend itself to compliance by agricultural sources whose practices vary farm-by-farm and locality-by-locality. In addition, the cost of controls used by the best-performing sources would increase the operating expenses for all farms regardless of size.

While this discussion only begins to address the practical difficulties that agricultural producers will face if EPA were to regulate GHGs under the CAA, these questions have not been raised in the draft ANPR in the context of agriculture. USDA believes that these issues must be thoroughly considered before a rule is finalized.

Capture and Sequestration

The draft ANPR does not sufficiently address the promise of carbon capture and sequestration, or how a Clean Air Act regulatory framework could address these issues. In describing emissions by sector, the draft ANPR does contain the following brief introductory statement:

> *Land Use, Land-Use Change, and Forestry:* Land use is not an economic sector per se but affects the natural carbon cycle in ways that lead to GHG emissions and sinks. Included in this category are emissions and sequestration of CO_2 from activities such as deforestation, afforestation, forest management and management of agricultural soils. Emissions and sequestration depend on local conditions, but overall land use in the United States was a net sink in 2006 equivalent to 12.5 percent of total GHG emissions.

Thus, the United States Government, as well as private landowners throughout the country, possess land resources that hold potentially tremendous economic and environmental value in a carbon-limited environment.

Unfortunately, in the draft ANPR's extensive discussion of regulatory alternatives, the EPA staff does not even attempt to make the case that the Clean Air Act could or should be used to ensure that a regulatory scheme maximizes opportunities and incentives for carbon capture and sequestration. Had the draft ANPR raised these issues, it would become evident that there are substantial questions as to whether the CAA could provide an effective vehicle to account for such beneficial actions.

Additionally, any regulatory program should avoid needless duplication and conflict with already existing efforts. The recently enacted Food, Conservation and Energy Act of 2008 (''Farm Bill'') requires the Secretary of Agriculture to establish technical guidelines to create a registry of environmental services benefits from conservation and land management activities, including carbon capture and sequestration. USDA is including EPA and other Federal agencies as participants in this process, which we believe holds substantial promise.

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Executive Office of the President
Council of Economic Advisers

Executive Office of the President
Office of Science and Technology Policy

July 10, 2008

The Honorable Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Subject: Environmental Protection Agency's Advance Notice of Proposed Rulemaking "Regulating Greenhouse Gas Emissions under the Clear Air Act"

Dear Administrator Dudley:

The Council of Economic Advisers and Office of Science and Technology Policy would like to offer our views on the science and economics that relate to EPA's ANPR entitled "Regulating Greenhouse Gas Emissions under the Clean Air Act." Our comments are divided into two parts. In the first, we address complexities associated with the phenomenon of anthropogenic climate change that distinguish it from traditionally regulated phenomena and that significantly increase the technical difficulty of regulation. In the second, we address the likely consequences for public welfare of various proposals for mitigating greenhouse gas (GHG) emissions.

Part I: Implications of the Complex Nature of Anthropogenic Climate Change

According to the Intergovernmental Panel on Climate Change (IPCC), "Warming of the climate system is unequivocal," "...Most of the observed increase in global average temperatures...is very likely due to the observed increase in anthropogenic greenhouse gas concentrations" and "...evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases" (IPCC Fourth Assessment). These straightforward and widely accepted scientific conclusions cover a huge range in the diversity, timing, and severity of climate change impacts on the public welfare that greatly complicate their analysis. While it is true, as the ANPR authors point out, that "The exact benefits and costs of virtually every environmental regulation are at least somewhat uncertain," (p 39) the authors nevertheless acknowledge that "In the case of climate change, the uncertainty inherent in most economic analyses of environmental regulations is magnified by the long-term and global scale of the problem and the resulting uncertainties regarding socioeconomic futures, corresponding GHG emissions, climate responses to emissions changes, the bio-physical and economic impacts associated with changes in climate, and the costs of reducing GHG emissions." The ability to assess potential costs and benefits of a particular regulatory mechanism is critical to informed policymaking. However, the long-term nature and global scale of climate change and the nature of the associated uncertainties, such as those raised in the ANPR and listed above, is such as to overwhelm the capability of existing technical means to trace public welfare impacts to specific regulated activities.

GHG emissions, especially of CO_2, arise from a very wide variety of natural, domestic, and industrial activities, nearly all of which are beneficial to society. Because the geographical and temporal patterns of emissions vary with technology and market-driven human choices, a regulatory approach to the mitigation of GHGs that is based on an assortment of activity-specific regulatory mechanisms, such as those described in the ANPR, must necessarily be responsive on relatively short time-scales to the changing emissions picture. No reliable model of technical innovation exists to forecast how these patterns are likely to change even in the immediate future. Current rapid changes in transportation and energy production and use, for example, came as a surprise to economists and markets around the world. In the absence of much more accurate forecasting for the array of CO_2 emitting activities, the regulatory process will be continually out of step with reality unless it can be designed to adjust itself on realistic time scales. Historical time scales for environmental regulation in the U.S. suggest that this will be impossible, especially for the very large array of interconnected activities that would need to be regulated to mitigate CO_2 emissions.

This technical complexity is indeed one of the reasons why economists and policy-makers favor broad market-oriented frameworks such as carbon taxes, technology-neutral subsides, or carbon trading schemes for GHG mitigation. The widespread support for such schemes is itself evidence for the impracticality of the array of regulatory mechanisms on which the ANPR seeks comment.

The diversity and complex distribution in space and time of GHG sources combine with intrinsic features of relevant climate phenomena to multiply further the obstacles to traditional regulation. Anthropogenically driven climate impacts are in nearly every case indistinguishable from naturally occurring phenomena. The anthropogenic contribution is apparent primarily in retrospective statistical analyses, and its adverse impacts cannot be readily distinguished from impacts that would have occurred in the absence of anthropogenic warming. Although few deny that anthropogenic causes underlie much of the general observed patterns, it is not the case that all "new" impacts exceeding historical means can be attributed to anthropogenic warming. The individual phenomena causing the impacts show strong regional variation and differing sensitivity to human behavior. Hurricane impacts, for example, are linked to coastal development patterns and to long term ocean circulation trends that occur with and without anthropogenic warming. Efforts to identify and evaluate specific localized adverse impacts uniquely associated with activities that lend themselves to regulation are nearly impossible under such circumstances. Tracing climate change causes to effects invariably requires simulations of the entire climate system. Such simulations are feasible for broad measures such as global and annually averaged surface temperatures, on whose link to GHG emissions there is broad agreement among scientists. The success of these simulations depends on thorough mixing of GHGs from all sources, so the individual characteristics and global distribution of different sources can be ignored. This same feature renders attribution of public welfare impacts to specific regulated activities subject entirely to elaborate schemes for accounting and allocating emissions on a global basis. Such attributions cannot be accomplished based on U.S. data alone. And the global atmospheric CO_2 budget is not simply the sum of all emissions – the Earth "breathes" seasonally in a striking pattern whose details depend on a mix of human behaviors (*e.g.* deforestation) and natural causes (*e.g.* volcanic activity). Consequently a useful model for assessing significance and attributing share of public welfare impacts will necessarily be extremely complicated. As the ANPR authors note: "Quantifying the *exact* (emphasis added) nature and timing of impacts due to climate change over the next few decades and beyond, and across all vulnerable elements of U.S. health, society and the environment, is currently not possible." Nor is it currently possible to quantify impacts even to a *less exact* standard that is needed to regulate GHGs through the Clean Air Act.

Overarching all these complexities is the unprecedented temporal quality of global climate change. Activities currently proposed for regulation will have no impact on public welfare for decades (except for possible beneficial side effects on traditional pollutants). Consequently, all approaches to the assessment of impacts necessarily involve forecasts. While the physical phenomena involved in anthropogenically induced global climate change are reasonably well understood, despite their complexity, the social phenomena that influence GHG producing activities are not at all well understood, which creates huge uncertainties in climate projections. All current forecasts of global warming that extend beyond roughly a decade are based on scenarios that assume a pattern of human behavior. These scenarios vary widely, but probably not widely enough given the very weak ability of science to predict how nations, markets, and individuals respond to their environments. Within its continually expanding limits, science can estimate the implications of social scenarios for anthropogenic global warming, but it has little power to assess the validity of the scenarios themselves.

Of all the effects that complicate the scientific analysis of GHG regulation, none is more profound and less tractable than the unpredictability of human behavior. Because the largest sources of anthropogenic CO_2 are linked to the use and production of energy, and because energy is an essential ingredient of all economically productive activity, GHG producing activities cannot be simply extracted from the tightly woven matrix of any economy. And economic globalization ensures that the matrix of anthropogenic climate influence is global. Regulation of specific GHG producing activities to achieve a specific target entails an analytical framework that gives some assurance that the targets can be reasonably met. No credible framework exists for this purpose. This fact seems to have been appreciated by political leaders who have endeavored to forge broad international agreements to reduce GHG emissions. As President Bush noted when launching a new U.S. policy for limiting emissions earlier this year, "The Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act were never meant to regulate global climate." Given the long-term nature and global scale of climate change and the nature of the uncertainties inherent in its associated impacts, the machinery of the Acts' regulatory frameworks are clearly not adequate to the task.

Part II: Consequences of Proposed Remedies

Any attempt to use the Clean Air Act to regulate greenhouse gases efficiently is fraught with difficulties, for two reasons. First, the EPA, which is charged with overseeing the Clean Air Act, is unlikely to have the statutory authority to implement economically neutral approaches such as a carbon tax, a cap-and-trade with a safety valve, and/or technology-neutral subsidies. Such approaches, which are typically the centerpiece of economic mechanisms to GHG regulation, allow markets to choose the best and most cost-effective way to deal with GHGs and do the least harm to the economy. Limitations on authority are mentioned in EPA's Advanced Notice of Proposed Rule-Making (ANPR). Second, and perhaps as a consequence of such limitations, the regulations considered by the authors of the ANPR are a cumbersome set of rules and restrictions that are in some cases excessive, inadequate, redundant, inordinately burdensome to the economy, and almost certain to fail to produce the desired climate results. Because of specific limitations in the law, the Clean Air Act does not permit the EPA to attain economic efficiency while reducing GHG emissions, even in the narrow context of emissions by the United States. It is even less effective when viewed in the global context appropriate for greenhouse gases. We detail some of our concerns in what follows.

First, the Clean Air Act would result in excessive regulation. Under one likely scenario, the same standard for GHG emissions would be required from each state in the country, which might force the EPA to regulate GHGs much too stringently in some situations. To obtain economic efficiency, it is necessary to equalize marginal abatement costs across sources, which is extremely unlikely to occur if states are required to meet the same standard. Consequently, some states would be required to reduce emissions in an extremely expensive manner, while others that are better able to reduce emissions cheaply would have little incentive to do so. The consequence would be higher costs to the economy than necessary, borne disproportionately by specific industries, workers and consumers. Ann Klee, former General Counsel for the EPA, stated in her Senate testimony of April 24, 2007:

> "Although the argument could be made that CO_2 meets the statutory threshold for designation and regulation as a criteria pollutant, it is evident that this would make little sense from a regulatory perspective. If the standard were set at a level intended to force reductions in emissions, i.e., at some atmospheric concentration below current levels (approximately 370-380 parts per million CO_2), then the entire country would be designated as being in nonattainment. This would trigger the regulatory mechanisms of the NAAQS program … This should be of concern to States that face potentially significant penalties for persistent nonattainment."

An alternative scenario under the Clean Air Act would regulate GHG emissions by requiring every source to meet some average emissions standard, irrespective of costs. This means that each sector would be required to reduce emissions to a point that is considered technologically achievable rather than economically efficient.

The Clean Air Act also makes it very difficult to loosen constraints, once regulations have been promulgated. Because the inherent benefits of limiting emissions remain uncertain, it is important to retain the ability to adjust stringency up or down over time.

Second, the Clean Air Act may be inadequate. The ANPR recognizes that the Clean Air Act was designed to protect local and regional air quality by controlling emissions with a limited range of impacts. GHGs however, become relatively evenly distributed through the atmosphere, irrespective of their point of origin. The specific source of emission reduction has little or no bearing on the benefit of reduction, but the cost of reductions may vary greatly by source. However, the Clean Air Act generally precludes decision makers from considering costs, and does not permit regulations to depend on mitigation actions taken by other countries. The failure to allow for contingencies of this sort removes an important tool for inducing other countries to take actions that benefit Americans and the rest of the world.

Third, regulation of GHG through the Clean Air Act will prove inordinately burdensome. For instance, one section of the Act specifies threshold levels, which, for traditional pollutants, captures only the larger polluters. The same thresholds applied to GHGs would increase the number of affected sources by an order of magnitude, implying the regulation of sources that were not previously regulated nor intended to be regulated under the Clean air Act. The statute sets a "major source" threshold value of, at most, 100 tons per year of any air pollutant (or less in non-attainment areas.)[1] Small manufacturing facilities, schools, and shopping centers have potential emissions of 100 tons per year or more. If GHGs are regulated under the Clean Air Act, those sources will become a "major sources" and must undergo full major source permitting and would be required to adhere to EPA regulations.

Fourth, the Clean Air Act entails redundancy. The ANPR acknowledges that even if an economy-wide program were legally possible under the Clean Air Act, it would have to be accompanied by source-specific or sector-based requirements as a result of other Clean Air Act provisions. This could result in multiple, overlapping and perhaps conflicting incentives to reduce GHG emissions.

Finally, any GHG regulation imposed under the Clean Air Act is almost certain to fail. Even an economy-wide system will not be effective unless it is coupled with significant GHG reductions by all major economies. The Clean Air Act is not the appropriate vehicle to accomplish worldwide reductions in GHG emissions. Furthermore, acting in a globally uncoordinated fashion will put the United States at a competitive disadvantage, will induce economic distortions and may actually be counter productive in reducing GHGs. The most obvious example of this involves "leakage," where the U.S. imposes costs on businesses that emit greenhouse gases to which other countries are not subject. If businesses in other countries do not suffer the penalty for emitting GHGs, production has an incentive to move abroad, even when producing in the U.S. would be more economically efficient.

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[1] EPA. Advanced Notice of Proposed Rulemaking. Section VII, Part E.2.

We believe that the Clean Air Act is not the appropriate statutory framework for dealing with climate change. The Clean Air Act was never intended to address issues with the global complexity of GHG emissions. Challenges in addressing climate change under the Clean Air Act are compounded by intrinsic characteristics in both its science and its economics. Instead, Congress needs to examine this issue directly, make the difficult choices that are inherent in any regulatory policy, and come up with an approach that imposes the minimum economic distortion for the maximum climate change benefit.

Edward P. Lazear
Chairman
Council of Economic Advisers

John H. Marburger, III
Director
Office of Science and Technology Policy

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

CHAIRMAN

July 10, 2008

Honorable Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Re: Environmental Protection Agency Draft Advance Notice of Proposed Rulemaking

Dear Administrator Dudley,

Thank you for the opportunity to provide comments on the Environmental Protection Agency's Draft Advance Notice of Proposed Rulemaking "Regulating Greenhouse Gases Under the Clean Air Act" produced by agency staff for interagency review. Regrettably, the staff draft and supporting technical documents run several hundred pages in length and we have had a limited period of time to consider the material. Therefore, we are able to provide only a few preliminary and highly general comments, focusing on important areas of inquiry that the draft either does not address or does not adequately address as a basis for seeking public comment during the advanced notice of propose rulemaking stage. In the short time provided, we have not been able to work through specific questions and issues with the Agency, and therefore are not able to support or otherwise endorse the draft document in its present form.

Overarching Comment

In his Rose Garden speech on April 16, 2008, President Bush announced a new national goal for reducing greenhouse gas emissions and outlined the new federal mandates, incentives, and other programs now in place that will help us achieve the goal. Acknowledging that further policies for the power generation sector would be necessary to fully achieve the goal, the President outlined the right way and the wrong way to proceed with any new policies. The EPA staff draft ANPR demonstrates why unaccountable new regulation under the existing Clean Air is the wrong way to accomplish our goals.

The staff draft does not provide a full and meaningful discussion of the broader policy and economic context in which it is considering, in the event of an endangerment finding, triggering the prospect of essentially automatic and immediate regulation over a vast range of community and business activity and an equally vast range of potential discretionary regulations with respect to the same and additional activities. In Massachusetts v. EPA, the Supreme Court reaffirmed that "EPA no doubt has significant latitude as to the manner, timing, content and coordination of its regulations with those of other agencies." 127 S.Ct. 1438.1462 (2007) The staff draft, however, is long on "manner" and "content," and short on "timing," "coordination," and any meaningful sense of context. It myopically focuses on the Clean Air Act and ignores or understates major intended and unintended consequences that would flow from misapplying decades-old regulatory tools applicable to local and regional pollution that were never designed to address greenhouse gas emissions and the global nature of these emissions.

The staff draft employs a kitchen sink approach to the innumerable ways in which EPA would use the Clean Air Act to automatically or discretionarily regulate an unprecedented range of activities giving rise to greenhouse gas emissions. Yet the staff draft provides little or no discussion of the extent to which new EPA regulations would duplicate, contradict, or effectively countermand the numerous mandates, incentives, and public private partnerships that are already underway and producing real results in addressing greenhouse gas emissions. This concern is particularly acute to the extent EPA action would effectively override the deliberate, bi-partisan decisions of elected federal and state legislatures on certain policies, as well as overriding some of EPA's own successful programs.

For example, less than one year ago, the U.S. Congress passed the Energy Independence and Security Act of 2007 (EISA) which prescribes new mandatory programs and specifies targets for vehicle fuel efficiency, renewable fuels, lighting efficiency, appliance efficiency, and federal government vehicle and building operations. The Department of Transportation, in consultation with other agencies, including EPA, has already proposed an aggressive path to greater vehicle fuel efficiency in accordance with Congress' direction. EPA itself is already working to implement new renewable fuel requirements. And the Department of Energy is working on a new round of appliance efficiency standards and, in accordance with new EISA requirements, is embarking on a new round of standard-setting. These and other EISA requirements will prevent billions of tons of greenhouse gas emissions from entering the atmosphere. In order to better inform and guide appropriate public comment, EPA's ANPR should provide a full discussion of these authorities and a preliminary analysis of how they, intersect with and obviate duplicative or contradictory approaches under the Clean Air Act.

In addition to the EISA mandates, the potential for duplication, conflict, and misplaced prioritization and methods can arise in a number of other contexts, including:

- The parties to the Montreal Protocol recently adopted a proposal advance by the United States and a number of other countries to accelerate the phaseout of HCFCs— producing emission reductions that could exceed those of the Kyoto Protocol. A statutory framework for such emissions is already in place.
- A significant number of states have already enacted renewable portfolio standards carefully tailored to each state's unique energy system and capacity.
- The Department of Energy has produced new model building energy efficiency codes, tailored to different geographic regions and circumstances, and is working constructively with states and localities interested in adopting the relevant model code.
- Through the Energy Policy Act of 2005 and other legislation, Congress has chosen to use an incentive-based, rather than mandatory approach to addressing energy security and greenhouse gas emissions in certain sectors through a broad range and billions of dollars of subsidies for commercial deployment of cleaner, more efficient technologies including, nuclear power, more efficient coal power, renewable power (wind, solar, biomass, etc.), bio-fuels, highly fuel efficient vehicles. And more than 40 billion dollars in loan guarantee authority is being made available this year alone for nuclear power plants, large scale renewable power, carbon capture and storage, and other large scale opportunities to avoid, reduce, or capture greenhouse gas emissions.
- Through its multi-billion dollar conservation programs, the Department of Agriculture is directly subsidizing farmers and other landowners to compete for funding for projects

that will help biologically sequester carbon dioxide emissions. The Department is also providing substantial incentives for biofuel and biomass production facilities.

- DOE's Climate Vision partnership, EPA's Climate Leaders Partnership, and numerous subject specific partnerships such as EPA's Natural Gas Star and the EPA/DOE Energy Star programs are successfully establishing and meeting targets for greenhouse gas mitigation through public-private commitments and programs that are producing measurable results.

These programs, and the numerous others comprising the federal government's comprehensive climate change strategy, should be the starting point for any discussion as to whether further legislation, let alone regulation should be considered. EPA's ANPR should provide a full discussion of these authorities and a preliminary analysis of how they intersect with and obviate duplicative or contradictory approaches under the Clean Air Act in order to better inform and guide appropriate public comment.

Endangerment Finding

EPA should include in the ANPR and the docket the material, analysis, and final agency determinations that formed the basis for the agency's original denial of the petition for rulemaking as to mobile sources of pollution and should take public comment on the implications of that analysis in the agency's decision as to whether it can or should make an endangerment finding at this time. In Massachusetts v. EPA, the Supreme Court did not address the substantive merits of EPA's original analysis ("We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding.") 127 S.Ct. at 1463. Instead, the court took issue with EPA reaching a "judgment" not to proceed with regulation without basing the reasons for its decision on the text of the Clean Air Act. The court held "only that EPA must ground its reasons for action or inaction in the statute" --in this case, running the analysis through the prism of the endangerment provisions of the Clean Air Act. (*Id.*). Doing so would seem to be the most immediate and essential response to the Court's remand. In this regard, however, the staff draft omits major elements and in some instances appears to be inconsistent with elements of the prior final agency determinations, signed by the EPA Administrator, concerning the state of the science, which are clearly relevant to the question of endangerment and which were not addressed one way or the other by the court.

EPA should take comment on the issues raised in the recent remarks by the Director of the Office of Science and Technology Policy concerning the current and future capability of the science with respect to predictions and projections of negative and positive climate impacts on a national, regional, and local scale. "Reflections on the Science and Policy of Energy and Climate Change," American Geophysical Union Fall Meeting, December 10, 2007. Any endangerment finding in the context of greenhouse gas emissions must draw from the emerging science of climate impacts. The Director's remarks provide helpful context for how to think through such issues and should be included in the docket.

EPA should take comment on the appropriate scope of activity that should be considered in making an endangerment decision in the context of greenhouse gas emissions. The remand from the Court focused on the issue of endangerment with respect to the relative contribution of emissions from new motor vehicles to associated health or welfare impacts. Yet, the staff draft suggests an unprecedented approach of aggregating emissions of all greenhouse gases from all sources as the basis of an endangerment determination.

EPA should take comment on the extent to which it should subtract from the emissions projections for a source, reductions that are substantially likely to occur as a result of existing mandatory and incentive-based policies. For example, with respect to mobile sources, the 2007 EISA contains new mandates for vehicle fuel efficiency and for renewable fuel, supported by substantial federal budgets incentives that will substantially reduce the greenhouse gas portfolio of such mobile sources.

EPA should also take comment on the extent to which its emissions projections for a source category should account for the problem of carbon leakage, occasioned by the current lack of meaningful and predictable international participation in greenhouse gas mitigation efforts. The IPCC has projected that most of the future increase in emissions will be produced by the major developing countries, whose cumulative emissions will also exceed those of the developed world relatively soon. Accordingly, EPA's assumptions about the relative benefits of reducing greenhouse gas emissions at a certain cost here in the U.S. would need to be offset by reasonable assumptions about 1) the growth in emissions in countries that are not taking comparable steps and 2) the prospect that increased costs in the U.S. will drive a certain amount of production and associated emissions to other countries not taking comparable steps, thereby increasing emissions in those countries. EPA provided relevant analysis when it modeled the impact of S. 2191 earlier this year and found that the economy-wide emissions reductions that would be required by that bill (approx. 70% reductions by covered entities) would have resulted in a miniscule 1-2% change in global greenhouse gas concentrations at a cost of trillions of dollars. The S.2191 analysis and other relevant analysis should be included in the docket.

Regulatory Content

EPA should provide for public comment a much more complete technical, institutional, and economic analysis of the far reaching consequences that will arise from the automatic application of existing regulations that would occur in the event EPA makes an endangerment finding. The existing regulations as to conventional pollutants were never designed for the unique global characteristics and environmental aspects of greenhouse gas emissions. Also, the existing regulations were designed and implemented gradually over the course of more than thirty years, during which time states were able to build the capacity to implement, monitor and enforce an increasingly complex set of regulations, and entities subject to regulations were able to transition their activities to new levels of performance over time. In the event of an endangerment finding with respect to greenhouse gases, however, the cumulative impact of more than thirty years of regulation will immediately be imposed on the states and currently regulated entities in one fell swoop.

To complicate matters, the staff draft downplays the significance of the fact that applying regulations designed for relatively concentrated pollutants to relatively unconcentrated and voluminous emissions such as carbon dioxide will subject tens or even hundreds of thousands of community and business enterprises to Clean Air Act regulation for the first time. The administrative implications and costs of this alone would be daunting for and federal budgets and staff. But the novel, case-by-case application of old regulations to an entirely new set of circumstances and parties foreshadows unrelenting confusion, conflicts over compliance, and decades long litigation windfall for attornies, consultants, and activists, as communities and the courts strive to sort it all out.

Another issue that requires a full and complete analysis is the potential for the unintended consequences of conflicting efforts with respect to possible automatic regulation of substances for which we have existing obligations under the Montreal Protocol. For example, the successful acceleration of the phaseout of HCFCs in developed and developing countries depends on the accessibility of HFCs substitutes with zero-ozone depleting potential but are greenhouse gases. Any additional regulation on HFCs as a greenhouse gas could lead to a delay in the transition away from ozone-depleting compounds, which could increase risk to human health and undermine the significant domestic and global progress in protecting the ozone layer. EPA should give careful consideration and solicit comment on the potential for this consequence.

Yours sincerely,

James L. Connaughton

SBA
Office of Advocacy
www.sba.gov/advo

Advocacy: the voice of small business in government

July 8, 2008

BY ELECTRONIC MAIL

The Honorable Stephen L. Johnson
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U.S. Environmental Protection Agency
Ariel Rios Building
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Washington, D.C. 20460

The Honorable Susan E. Dudley
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
725 17th Street, N.W.
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RE: Docket ID No. EPA-HQ-OAR-2008-0318, Comments on EPA's draft Advance Notice of Proposed Rulemaking "Regulating Greenhouse Gas Emissions under the Clean Air Act"

Dear Administrator Johnson and Administrator Dudley:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments in response to the draft Advance Notice of Proposed Rulemaking (ANPR) prepared by the U.S. Environmental Protection Agency (EPA) entitled "Regulating Greenhouse Gas Emissions under the Clean Air Act."

Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small entities before Federal agencies and Congress. Because Advocacy is an independent body within the U.S. Small Business Administration (SBA), the views expressed by Advocacy do not necessarily reflect the position of the Administration or the SBA.[1]

[1] 15 U.S.C. § 634a, *et. seq.*

Advocacy has reviewed the draft ANPR, and, based on our initial reading, we have serious concerns with how EPA's regulation of greenhouse gases (GHGs) through the Clean Air Act framework would negatively impact small entities.[2] We believe that the regulatory approaches outlined in the ANPR, taken in part or as a whole, would impose significant adverse economic impacts on small entities throughout the U.S. economy. The draft ANPR acknowledges that using existing Clean Air Act regulatory approaches to control GHGs would subject large numbers of firms to costly and burdensome new requirements.

Expanding the Prevention of Significant Deterioration/New Source Review (PSD/NSR) program to cover carbon dioxide (CO2) emissions, in and of itself, would make many small businesses that have not previously had to deal with the Clean Air Act subject to extensive new clean air requirements. Because relatively small facilities can generate substantial quantities of CO2 and exceed the PSD/NSR regulatory threshold,[3] small entities would be captured by the CO2 PSD/NSR permitting requirement when they are constructed or modified. These small entities would include small businesses operating office buildings, retail establishments, hotels, and other smaller buildings. Buildings owned by small communities and small non-profit organizations like schools, prisons, and private hospitals would also be regulated. It is difficult to overemphasize how potentially disruptive and burdensome such a new regulatory regime would be to small entities. In our view, those costs would likely be imposed on large numbers of small entities with little corresponding environmental benefit in terms of reduced GHG emissions.

I. THE CLEAN AIR ACT REGULATORY FRAMEWORK

The ANPR demonstrates that the Clean Air Act regulatory framework is poorly suited as a mechanism to control GHG emissions. Several key examples illustrate this:

A. Prevention of Significant Deterioration/New Source Review (PSD/NSR). The PSD/NSR program currently requires the owners and operators of major stationary sources of air pollutants[4] to obtain construction permits before they can build or modify their facilities. Issuance of permits to construct or modify these facilities is predicated upon the completion of measures designed to ensure that the facility will not degrade local air quality. Firms seeking PSD/NSR permits must install the most advanced emission controls, meet stringent emission standards, and provide data to show that their

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[2] Under the RFA, small entities are defined as (1) a "small business" under section 3 of the Small Business Act and under size standards issued by the SBA in 13 C.F.R. § 121.201, or (2) a "small organization" that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field, or (3) a "small governmental jurisdiction" that is the government of a city, county, town, township, village, school district or special district with a population of less than 50,000 persons. 5 U.S.C. § 601.

[3] For PSD, the thresholds are 100 tons per year of pollutant for 28 listed industrial source categories, 250 tons per year for other sources. See 40 C.F.R. §§ 51.166(b)(1) and 52.21(b)(1). For nonattainment NSR, the major source threshold is generally 100 tons per year.

[4] A "major stationary source" for PSD meets or exceeds the annual emission thresholds listed in the note 3, *supra*.

emissions will not harm air quality. Currently, obtaining a PSD/NSR permit for a coal-powered source typically requires at least a year of preparation time and costs up to $500,000, not including the cost of purchasing, installing, and maintaining control equipment.

Today, EPA estimates that 200 to 300 of these permits are issued each year by federal, state, and local authorities. Processing PSD/NSR permits represents a major resource commitment for these permitting authorities, as well as for the permit applicant. As EPA has noted, "there have been significant and broad-based concerns about [PSD/NSR] implementation over the years due to the program's complexity and the costs, uncertainty, and construction delays that can sometimes result from the [PSD/NSR] permitting process."[5] This problem would be greatly exacerbated by regulating GHGs under the PSD/NSR program. EPA believes that "if CO2 becomes a regulated NSR pollutant, the number of [PSD/NSR] permits required to be issued each year would increase by more than a factor of 10 (i.e., more than 2,000 – 3,000 permits per year) . . . the additional permits would generally be issued to smaller industrial sources, as well as large office and residential buildings,[6] hotels, large retail establishments, and similar facilities."[7] Not only would many more facilities become subject to PSD/NSR permitting requirements, but smaller firms that have never been subject to Clean Air Act permitting requirements would become regulated for the first time. EPA has likely greatly underestimated the large number of sources that would be required to obtain PSD/NSR permits if GHGs were included in the program. Neither EPA nor state and local permitting authorities have the resources to administer such a large volume of PSD/NSR permit applications; as a result, construction and modification activities would virtually come to a standstill. Any marginal reductions in GHGs achieved would not justify the tremendous costs and regulatory burdens imposed. Even if EPA is correct in its estimate, and the increase in businesses that must obtain PSD/NSR permits is only a tenfold increase, and even if the cost and administrative burdens associated with obtaining a PSD/NSR permit were to be dramatically reduced, a substantial number of small entities can be expected to experience a significant adverse economic impact by having to obtain CO2 PSD/NSR permits.

B. Hazardous Air Pollutant (HAP) Standards. Section 112 of the Clean Air Act requires EPA to regulate air pollutants classified as hazardous under section 112(b).[8] While GHGs are not currently listed as hazardous air pollutants (HAPs), EPA has solicited comments on whether GHGs should be regulated as HAPs. Based on Advocacy's experience with rules designed to regulate HAPs, particularly the area source rules that regulate non-major sources of HAPs,[9] many of which are small entities, the section 112 framework would be a poor mechanism for regulating GHGs. Typically, HAPs are emitted at relatively low volumes and are known to have health effects, which

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[5] Draft ANPR (June 17, 2008) at 230.

[6] "Large residential buildings" presumably means homes. According to Office of Advocacy research, 53% of all small businesses are home-based businesses.

[7] Draft ANPR (June 17, 2008) at 225.

[8] 42 U.S.C. § 74129(b).

[9] Area sources are stationary sources of HAPs that emit less than 25 tons per year of any combination of HAPs and less than 10 tons per year of any single HAP. 42 U.S.C. § 112(a)(1),(2).

are generally localized, at low thresholds. HAP emission rules often require very costly technologies to eliminate relatively small amounts of HAP from being emitted to the air. Because the HAPs are recognized as causing serious health effects, HAP regulations often impose control costs that are much higher on a per ton basis than any other type of air pollutant.

By contrast, GHGs (and CO2 in particular) are ubiquitous, are distributed uniformly throughout the atmosphere, and have no demonstrated adverse health effects at ordinary atmospheric concentrations. Using section 112 to control GHGs would not be a reasonable regulatory approach. Imposing high per-ton GHG control costs through a HAP standards-type regime would yield small reductions in GHG at enormous cost to sources, especially small entities.

C. Title V Permit Program. EPA also solicits comments on whether and how GHG requirements could be included in Title V operating permits. Based on the cost, complexity, and administrative burdens associated with obtaining Title V operating permits, Advocacy believes that Title V permits should not be required of sources on the basis of GHG emissions. Currently, federal, state, and local permitting authorities issue Title V operating permits to a limited subset of the stationary sources of air pollution in the United States. Applying for and obtaining a Title V permit is time-consuming and expensive. In the late 1990's, for example, many major stationary sources spent more than $100,000 to obtain initial Title V permits, when the cost of hiring consultants and technical personnel is considered. Again, even if EPA were able to dramatically decrease the cost of applying for and complying with GHG Title V permits, the cost and burden would be an enormous new impact, particularly on small entities.

EPA has taken steps to ensure that Title V permits are principally required for larger stationary sources. EPA initially administratively deferred Title V applicability for non-major sources, and, more recently, EPA has allowed area sources of HAPs to satisfy Title V compliance demonstrations through less burdensome means. EPA understands that administering Title V permits is a resource-intensive process for all parties, and that forcing smaller facilities to comply imposes great burden and cost for little commensurate environmental gain. Requiring small firms that would otherwise not be subject to Title V to obtain Title V permits on the basis of GHG emissions would not be worth the cost to companies or the heavy additional load placed on permitting authorities' resources.

D. National Ambient Air Quality Standards. EPA further solicits comments on whether it should develop a National Ambient Air Quality Standard (NAAQS) for CO2 and other GHGs. In Advocacy's view, EPA should not seek to develop a GHG NAAQS. GHGs are fundamentally different than any of the current NAAQS criteria pollutants. CO2, for example, is distributed broadly through the atmosphere and is ubiquitous, rendering geographic determinations useless in mitigating CO2 levels. The wide and uniform distribution of CO2 would mean that the entire country would either be classified as in attainment or out of attainment. Either way, small entities, in turn, would become subject to rigid new "one-size-fits-all" GHG requirements, regardless of local conditions or their actual emissions of GHGs.

Therefore, rather than merely serving as a useful vehicle to administer a national GHG cap and trade program, establishing a GHG NAAQS would set in motion a number of statutory control measures that would be costly, inefficient, and ineffective. Small entities could have to contend with new barriers to construction and expansion, new restrictions on operating cars and trucks, and the potential for having to retrofit their existing buildings with GHG controls or to purchase equivalent credits. These NAAQS control measures would subject vast numbers of small entities across the country to standardized, inflexible GHG control requirements for the very first time. The full impact of these new burdens on these small entities could be devastating.

E. Mobile Source Requirements. EPA also solicits comments on using the Mobile Source provisions of the Clean Air Act to control GHGs. EPA would impose new regulatory requirements on on-highway motor vehicles, as well as non-road vehicles and equipment. These GHG requirements would be imposed in addition to the renewable fuel standards contained in the Energy Independence and Security Act of 2007 (EISA),[10] which requires 36 billion gallons of renewable fuel to be blended into the nation's gasoline and diesel fuel supply by 2022. To a large degree, the goal of EISA was to address GHGs from mobile sources.

In Advocacy's view, using the mobile source provisions of the Clean Air Act to further impose new GHG requirements are likely to have serious adverse impacts on small entities that rely on vehicles and equipment. On-board GHG control measures such as speed limiters would have a major impact on small entities that operate trucks or other vehicle fleets. Other requirements designed to limit the use of vehicles will similarly impact small businesses that depend on being able to pick up and deliver goods, or to travel to and from their clients. These requirements could be a particular hardship for trucking companies, and the numerous small communities that depend entirely on long-haul trucks for delivery of their food supplies and other goods.

II. DISPROPORTIONATE IMPACTS ON SMALL ENTITIES

Our concerns about the advisability of regulating GHGs under a massive and unwieldy new environmental regulatory scheme that will capture hundreds of thousands of small businesses is motivated by our knowledge of how regulations often unfairly impact small entities.

A. Advocacy's Research. An Advocacy-funded report that details the $1.1 trillion cumulative regulatory burden on enterprise in the United States shows how the smallest businesses bear a 45 percent greater burden than their larger competitors.[11] The annual cost per employee for firms with fewer than 20 employees is $7,747 to comply with all

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[10] Pub. L. No. 110-140 (2007).

[11] W. Mark Crain, *The Impact of Federal Regulations on Small Firms*, funded by the U.S. Small Business Administration, Office of Advocacy (2005).

federal regulations.[12] That cost is more, on a per-household basis, than what Americans pay for health insurance. When it comes to compliance with environmental requirements, small firms with fewer than 20 employees spend four times more, on a per-employee basis, than do businesses with more than 500 employees.[13]

B. Any GHG Rule Must Be Subject to a SBAR Panel. The owners of small businesses want to comply with applicable environmental rules. However, the growing thicket of clean air, solid waste, water quality, and other environmental requirements emanating from local, state, federal, and global authorities is daunting. If EPA chooses to go forward with plans to use the Clean Air Act to address climate change, the Office of Advocacy will insist that the views of small entities be considered in the pre-proposal stage as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).[14] The direct involvement of small entities has benefited over 30 EPA rulemakings since President Clinton signed SBREFA in 1996. The "Small Business Advocacy Review" (SBAR) panels required by SBREFA provide EPA with on-the-ground, real world, experienced views from small business representatives who are relied upon to provide practical solutions for regulatory challenges faced by EPA. Nine prior SBAR panels have dealt with planned EPA rules issued under the Clean Air Act and, because small entities were involved, the final rules reflect a better understanding of how the regulations would impact small business. Millions of dollars have been saved because poorly designed approaches and unintended consequences are filtered out of proposed regulations with the help of small entities and government officials.[15] These changes are accomplished without compromising valuable protections for human health and the environment.[16]

C. EPA Should Not Ignore the Impact of GHG Regulation on Small Entities. Unfortunately, EPA has ignored small business input when issuing Clean Air Act regulations in the past. In 1997, for example, EPA determined that the revision of the NAAQS for ozone and particulate matter did not "directly regulate" small entities and was, therefore, exempt from the SBAR panel requirement to consider small entity input. In Advocacy's view, any movement forward by EPA to capture small entities in a reinterpretation of the Clean Air Act designed to address climate change will properly constitute direct EPA regulatory action. Even if EPA were to construct a legal argument that claims GHG regulations do not significantly impact a substantial number of small entities,[17] EPA would be better served by carefully considering the impact of GHG regulations on small businesses, small organizations, and small communities.

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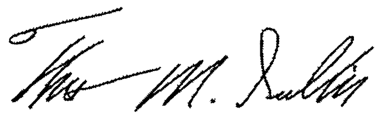
[12] *Id.*
[13] *Id.*
[14] 5 U.S.C. § 609.
[15] See the annual reports of the Regulatory Flexibility Act at: http://www.sba.gov/advo/laws/flex/
[16] 5 U.S.C. § 603 (c) explicitly requires that any alternatives to a regulatory proposal that would minimize the impact on small entities must "accomplish the stated objectives of applicable statutes."
[17] Under 5 U.S.C. § 605(b), EPA is not required to convene a SBAR panel if it certifies that the regulation will not have a significant economic impact on a substantial number of small entities.

We look forward to working with you to ensure that the impact on small entities is seriously considered prior to EPA moving ahead on regulating greenhouse gas emissions. Please do not hesitate to call me or Assistant Chief Counsel Keith Holman (keith.holman@sba.gov or (202) 205-6936) if we can be of further assistance.

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy

BILLING CODE 6560–50–C

General Information

What Should I Consider as I Prepare My Comments for EPA?

A. Submitting CBI

Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be confidential business information (CBI). For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. Tips for Preparing Your Comments

When submitting comments, remember to:

• Explain your views as clearly as possible.
• Describe any assumptions that you used.
• Provide any technical information and/or data you used that support your views.
• If you estimate potential burden or costs, explain how you arrived at your estimate.
• Provide specific examples to illustrate your concerns.
• Offer alternatives.
• Make sure to submit your comments by the comment period deadline identified.
• To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

Outline of This Preamble

I. Introduction

Climate change is a serious global challenge. As detailed in section V of this notice, it is widely recognized that greenhouse gases (GHGs) have a climatic warming effect by trapping heat in the atmosphere that would otherwise escape to space. Current atmospheric concentrations of GHGs are significantly higher than pre-industrial levels as a result of human activities. Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level. Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases. Future projections show that, for most scenarios assuming no additional GHG emission reduction policies, atmospheric concentrations of GHGs are expected to continue climbing for most if not all of the remainder of this century, with associated increases in average temperature. Overall risk to human health, society and the environment increases with increases in both the rate and magnitude of climate change.

Today's notice considers the potential use of the CAA to address climate change. In April 2007, the Supreme Court concluded in *Massachusetts* v. *EPA,* 127 S. Ct. 1438 (2007), that GHGs meet the CAA definition of ''air pollutant,'' and that section 202(a)(1) of the CAA therefore authorizes regulation of GHGs subject to an Agency determination that GHG emissions from new motor vehicles cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. The Court also ruled that in deciding whether to grant or deny a pending rulemaking petition regarding section 202(a)(1), EPA must decide whether new motor vehicle GHG emissions meet that endangerment test, or explain why scientific uncertainty is so profound that it prevents making a reasoned judgment on such a determination. If EPA finds that new motor vehicle GHG emissions meet the endangerment test, section 202(a)(1) of the CAA requires the Agency to set motor vehicle standards applicable to emissions of GHGs.

EPA is also faced with the broader ramifications of any regulation of motor vehicle GHG emissions under the CAA in response to the Supreme Court's decision. Over the past several months, EPA has received seven petitions from states, localities, and environmental groups to set emission standards under Title II of Act for other types of mobile sources, including nonroad vehicles such as construction and farm equipment, ships and aircraft. The Agency has also received public comments seeking the addition of GHGs to the pollutants covered by the new source performance standard (NSPS) for several industrial sectors under section 111 of the CAA. In addition, legal challenges have been brought seeking controls for GHG emissions in preconstruction permits for several coal-fired power plants.

The interrelationship of CAA authorities and the broad array of pending and potential CAA actions concerning GHGs make it prudent to thoroughly consider how the various CAA authorities would or could work together if GHG controls were established under any provision of the Act. Since regulation of one source of GHG emissions would or could lead to regulation of other sources of GHG emissions, the Agency should be prepared to manage the consequences of CAA regulation of GHGs in the most effective and efficient manner possible under the Act.

Today's notice discusses our work to date in response to the Supreme Court's decision regarding an endangerment finding and vehicle standards under section 202 of the Act. It also includes a comprehensive examination of the potential effects of using various authorities under the Act to regulate other sources of GHG emissions. In addition, this notice examines and seeks public comment on the petitions the Agency has received for GHG regulation of additional mobile source categories. In light of the interrelationship of CAA authorities and the pending CAA actions concerning GHGs, the notice identifies and discusses possible approaches for controlling GHG emissions under the Act and the issues they raise.

Today's notice is also part of broader efforts to address the climate change challenge. Since 2001, President Bush has pursued a broad climate change agenda that has improved our understanding of climate change and its effects, spurred development of needed GHG control technologies, increased our economy's energy efficiency, and engaged other nations in efforts to foster sensible solutions to the global challenge of climate change. Building on that success, the President recently announced a new national goal: to stop the growth of U.S. GHG emissions by 2025. New actions will be necessary to meet this goal.

The President has identified several core principles for crafting any new GHG-specific legislation. EPA believes these principles are also important in considering GHG regulation under the CAA, to the extent allowed by law. These principles include addressing GHG emissions in a manner that does not harm the U.S. economy; encouraging the technological development that is essential to significantly reducing GHG emissions; and recognizing that U.S. efforts to reduce GHG emissions could be undermined if other countries with significant GHG emissions fail to control their emissions and U.S. businesses are put at a competitive disadvantage relative to their foreign competitors. Throughout this notice we discuss and seek comment on whether and how these principles can inform decisions regarding GHG regulation under the CAA.

In Congress, both the House and Senate are considering climate change legislation. A number of bills call for reducing GHG emissions from a wide variety of sources using a ''cap-and-trade'' approach. Many of the sources that would be subject to requirements under the bills are already subject to numerous CAA controls. Thus, there is potential for overlap between regulation under the CAA and new climate change legislation.

This ANPR performs five important functions that can help inform the legislative debate:

- First, in recognition of the Supreme Court's decision that GHGs are air pollutants under the CAA, the ANPR outlines options that may need to be exercised under the Act.
- Second, this notice provides information on how the GHG requirements under the CAA might overlap with control measures being considered for climate change legislation.
- Third, the notice discusses issues and approaches for designing GHG control measures that are useful in developing either regulations or legislation to reduce GHG emissions.
- Fourth, the ANPR illustrates the complexity and interconnections inherent in CAA regulation of GHGs. These complexities reflect that the CAA was not specifically designed to address GHGs and illustrate the opportunity for new legislation to reduce regulatory complexity. However, unless and until Congress acts, the existing CAA will be applied in its current form.
- Fifth, some sections of the CAA are inherently flexible and thus more capable of accommodating consideration of the President's principles. Other sections may not provide needed flexibility, raising serious concerns about the results of applying them. EPA believes that the presentation in this notice of the various potential programs of the CAA will help inform the legislative debate.

EPA is following the Supreme Court's decision in *Massachusetts* v. *EPA* by seriously considering how to apply the CAA to the regulation of GHGs. In light of the CAA's interconnections and other issues explored in this notice, EPA does not believe that all aspects of the Act are well designed for establishing the kind of comprehensive GHG regulatory program that could most efficiently achieve the GHG emission reductions that may be needed over the next several decades. EPA requests comment on whether well-designed legislation for establishing a broad GHG regulatory framework has the potential for achieving greater environmental results at lower cost for many sectors of the economy, with less concern about emissions leakage and more effective, clearer incentives for development of technology, than a control program based on the CAA alone.

II. Background Information

A. Background on the Supreme Court Opinion

On October 20, 1999, the International Center for Technology Assessment (ICTA) and 18 other environmental and renewable energy industry organizations filed a petition with EPA seeking regulation of GHGs from new motor vehicles under section 202 (a)(1) of the CAA. The thrust of the petition was that four GHGs—carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs)—are air pollutants as defined in CAA section 302(g), that emissions of these GHGs contribute to air pollution which is reasonably anticipated to endanger public health or welfare, that these GHGs are emitted by new motor vehicles, and therefore that EPA has a mandatory duty to issue regulations under CAA section 202(a) addressing GHGs from these sources.

EPA denied the petition in a notice issued on August 8, 2003. The Agency concluded that it lacked authority under the CAA to regulate GHGs for purposes of global climate change. EPA further decided that even if it did have authority to set GHG emission standards for new motor vehicles, it would be unwise to do so at this time. More specifically, EPA stated that CAA regulation of CO_2 emitted by light-duty vehicles would interfere with fuel economy standards issued by the Department of Transportation (DOT) under the Energy Policy and Conservation Act (EPCA), because the principal way of reducing vehicle CO_2 emissions is to increase vehicle fuel economy. The Agency also noted in the 2003 notice that there was significant scientific uncertainty regarding the cause, extent and effects of climate change that ongoing studies would reduce. EPA further stated that regulation of climate change using the CAA would be inappropriate given the President's comprehensive climate change policies, concerns about piecemeal regulation, and implications for foreign policy.

EPA's denial of the ICTA petition was challenged in a petition for review filed in the U.S. Court of Appeals for the D.C. Circuit. Petitioners included 12 states, local governments, and a variety of environmental organizations. Intervenors in support of respondent EPA included 10 states and several industry trade associations.

The D.C. Circuit upheld EPA's denial of the petition in a 2–1 opinion (*Massachusetts* v. *EPA*, 415 F.3d 50 (D.C. Cir. 2005)). The majority opinion did not decide but assumed, for purposes of argument, that EPA had statutory authority to regulate GHGs from new motor vehicles and held that EPA had reasonably exercised its discretion in denying the petition.

In a 5–4 decision, the Supreme Court reversed the D.C. Circuit's decision and held that EPA had improperly denied ICTA's petition (*Massachusetts* v. *EPA*, 127 S. Ct. 1438 (2007)). The Court held that GHGs are air pollutants under the CAA, and that the alternative denial grounds provided by EPA were ''divorced from the statutory text'' and hence improper.

Specifically, the Court held that CO_2, CH_4, N_2O, and HFCs fit the CAA's definition of ''air pollutant'' because they are '' 'physical [and] chemical * * * substances which [are] emitted into * * * the ambient air.' '' *Id.* at 1460. The Court rejected the argument that EPA could not regulate new motor vehicle emissions of the chief GHG, CO_2, under CAA section 202 because doing so would essentially regulate vehicle fuel economy, which is the province of DOT under EPCA. The Court held that EPA's mandate to protect public health and welfare is ''wholly independent of DOT's mandate to promote energy efficiency,'' even if the authorities may overlap. *Id.* at 1462. The Court stated that ''there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.'' *Id.*

Turning to EPA's alternative grounds for denial, the Court held that EPA's decision on whether to grant the petition must relate to ''whether an air pollutant 'causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.' '' *Id.* Specifically, the Court held that generalized concerns about scientific uncertainty were insufficient unless ''the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming.'' *Id.* at 1463. The Court further ruled that concerns related to piecemeal regulation and foreign policy objectives were unrelated to whether new motor vehicle GHG emissions contribute to climate change and hence could not justify the denial.

The Court remanded the decision to EPA but was careful to note that it was not dictating EPA's action on remand, and was not deciding whether EPA must find there is endangerment. Nor did the Court rule on ''whether policy concerns can inform EPA's actions in the event that it makes such a finding.'' *Id.* The Court also observed that under CAA section 202(a), ''EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies.'' The Supreme Court sent the case back to the D.C. Circuit, which on September 14, 2007, vacated and remanded EPA's decision denying the ICTA petition for further consideration by the Agency consistent with the Supreme Court's opinion.

B. Response to the Supreme Court's Decision to Date

1. The President's May 2007 Announcement and Executive Order

In May 2007, President Bush announced that he was ''directing the EPA and the Departments of Transportation and Energy (DOT and DOE) to take the first steps toward regulations that would cut gasoline consumption and GHG emissions from motor vehicles, using my 20-in-10 plan as a starting point.'' The 20-in-10 plan refers to the President's legislative proposal, first advanced in his 2007 State of the Union address, to reduce domestic gasoline consumption by 20% by 2017 through the use of renewable and alternative fuels and improved motor vehicle fuel economy.

On the same day, President Bush issued Executive Order (EO) 13432 ''to ensure the coordinated and effective exercise of the authorities of the President and the heads of the [DOT], the Department of Energy, and [EPA] to protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines, in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth.''

In response to the Supreme Court's *Massachusetts* decision and the President's direction, EPA immediately began work with DOT and the Departments of Energy and Agriculture to develop draft proposed regulations that would reduce GHG emissions from motor vehicles and their fuels. In particular, EPA and DOT's National Highway Traffic Safety Agency (NHTSA) worked together on a range of issues related to setting motor vehicle GHG emission standards under the CAA and corporate average fuel economy (CAFE) standards under EPCA. As a prerequisite to taking action under the CAA, the Agency also compiled and reviewed the available scientific information relevant to deciding whether GHG emissions from motor vehicles, and whether GHG emissions from the use of gasoline and diesel fuel by motor vehicles and nonroad engines and equipment, cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

Sections V and VI of this notice provide further discussion and detail about EPA's work to date on an endangerment finding and new motor vehicle regulation under section 202 of the CAA.

2. Passage of a New Energy Law

At the same time as EPA was working with its federal partners to develop draft proposed regulations for reducing motor vehicle and fuel GHG emissions, Congress was considering broad new energy legislation that included provisions addressing the motor vehicle fuel economy and fuel components of the President's 20-in-10 legislative plan. By the end of 2007, Congress passed and the President signed the Energy Independence and Security Act (EISA). Title II of EISA amended the CAA provisions requiring a Renewable Fuels Standard (RFS) that were first established in the Energy Policy Act of 2005. EISA also separately amended EPCA with regard to the DOT's authority to set CAFE standards for vehicles.

With regard to the RFS, Congress amended section 211(o) of the CAA to increase the RFS from 7.5 billion gallons in 2012 to 36 billion gallons in 2022. There are a number of significant differences between the RFS provisions of EISA and the fuels program EPA was developing under the President's Executive Order. As a result, EPA is undertaking substantial new analytical work as part of its efforts to develop the regulations needed to implement the new RFS requirements. These regulations are subject to tight statutory deadlines.

With regard to motor vehicle regulations, EISA did not amend CAA section 202, which contains EPA's general authority to regulate motor vehicle emissions. However, EISA did substantially alter DOT's authority to set CAFE standards under EPCA. The legislation directs the Department to set CAFE standards that achieve fleet-wide average fuel economy of at least 35 miles per gallon by 2020 for light-duty vehicles, and for the first time to establish fuel economy standards for heavy-duty vehicles after a period of study.

In view of this new statutory authority, EPA and DOT have reviewed the previous regulatory activities they had undertaken pursuant to the President's May 14 directive and EO 13432. While EPA recognizes that EISA does not change the Agency's obligation to respond to the Supreme Court's decision in *Massachusetts* v. *EPA* or the scientific basis for any decision, the new law has changed the context for any action EPA might take in response to the decision by requiring significant improvements in vehicle fuel economy that will in turn achieve substantial reductions in vehicle emissions of CO_2.[25]

3. Review of CAA Authorities

As part of EPA's efforts to respond to the Supreme Court's decision, the Agency conducted a thorough review of the CAA to identify and assess any other CAA provisions that might authorize regulation of GHG emission sources. That review made clear that a decision to control any source of GHG emissions could or would impact other CAA programs with potentially far-reaching implications for many industrial sectors. In particular, EPA recognized that regulation of GHG emissions from motor vehicles under section 202(a)(1) or from other sources of GHG emissions under many other provisions of the Act would subject major stationary sources to preconstruction permitting under the CAA. As discussed later in this notice, the Prevention of Significant Deterioration (PSD) program established in Part C of Title I of the Act requires new major stationary sources and modified stationary sources that significantly increase their emissions of regulated air pollutants to apply for PSD permits and put on controls to reduce emissions of those pollutants that reflect the best available control technology (BACT). Because CO_2 is typically emitted in much larger quantities relative to traditional air pollutants, CAA regulation of CO_2 would potentially extend PSD requirements to many stationary sources not previously subject to the PSD program, including large buildings heated by natural gas or oil, and add new PSD requirements to sources already subject to the program. This and other CAA implications of regulation of GHG emissions under the Act are explored later in this notice.

C. Other Pending GHG Actions Under the CAA

1. Additional Mobile Source Petitions

Since the Supreme Court's *Massachusetts* decision, EPA has received seven additional petitions requesting that the Agency make the requisite endangerment findings and undertake rulemaking under CAA sections 202(a)(3), 211, 213 and 231 to regulate GHG emissions[26] from (1) fuels and a wide array of mobile sources including ocean-going vessels; (2) all other types of nonroad engines and equipment, such as locomotives, construction equipment, farm tractors, forklifts, harbor crafts, and lawn and garden equipment; (3) aircraft; and (4) rebuilt heavy-duty highway engines. The petitioners represent state and local governments, environmental groups, and nongovernmental organizations. Copies of these seven petitions can be found in the docket for this notice.

These petitions have several common elements. First, the petitioners state that climate change is occurring and is driven by increases in GHG emissions; that the mobile sources described in the petitions account for a significant and growing portion of these emissions; and that those mobile sources must therefore be regulated under the CAA. Second, the petitioners assert that EPA should expeditiously regulate GHG emissions from those mobile sources because they are already harming the petitioners' health and welfare and further delay by the Agency will only increase the severity of future harms to public health and welfare. Lastly, the petitioners contend that technology is currently available to reduce GHG emissions from the mobile sources for which regulation is sought.

Section VI of this notice provides a brief discussion of these petitions. The section also summarizes information on the GHG emissions of each of the three mobile source categories, technologies and other strategies for reducing GHG emissions from those categories, and potential approaches for EPA to address their emissions. We request comment on all issues raised by the petitioners.

2. New Source Performance Standards

The *Massachusetts* decision also impacts several stationary source rulemakings. A group of state and local governments and environmental organizations petitioned the U.S. Court of Appeals for the D.C. Circuit to review a 2006 decision by EPA not to regulate the GHG emissions of several types of steam generating units when the Agency conducted the periodic review of the new source performance standard (NSPS) for those units as required by CAA section 111. EPA based its decision on the position it announced in denying the ICTA petition that the CAA does not authorize regulation of GHG emissions. After the Supreme Court ruled that the CAA does provide authority for regulating GHG emissions, the Agency filed a request with the D.C. Circuit to have the NSPS rule remanded to us for further actions consistent with the Supreme Court's opinion. Our motion was granted, and this ANPR represents the next step in our efforts to evaluate and respond to the court's decision.

Another NSPS affected by the Supreme Court's decision is the standard applicable to petroleum refineries. Pursuant to a consent decree deadline, EPA proposed revisions to the NSPS on April 30, 2007, less than one month following the Supreme Court decision. During the comment period for the review, EPA received comments calling for the NSPS to be revised to include limits on GHG emissions. In our final rule on April 30, 2008, we declined to adopt standards for GHGs at that time. First, we noted that, in the context of statutorily mandated 8-year reviews for NSPS, EPA has discretion regarding the adoption of standards for pollutants not previously covered by an NSPS. We also explained that the significant differences between GHGs and the other air pollutants for which we have previously established standards under section 111 require a more thorough and deliberate process to identify and fully evaluate the implications of a decision to regulate under this and other provisions of the CAA before deciding how to regulate GHGs under the Act. We pointed to this notice as the means for providing that process. We further noted that the time period available for proposing NSPS was too short for EPA to evaluate and develop proposed standards in light of the *Massachusetts* decision.

EPA also recently issued proposed revisions of the Portland cement NSPS in accordance with the schedule of a

[25] The Current Unified Agenda and Regulatory Plan (Regulatory Plan) available in May 2008 reflects that EPA is addressing its response to *Massachusetts* v. *EPA* as part of today's notice. The latest Regulatory Plan also contains a new entry for the renewable fuels standard program EPA is undertaking pursuant to Title II of EISA (RIN 2060–AO81). The current Regulatory Plan is available at *http://www.reginfo.gov/public/do/eAgendaMain.*

[26] While petitioners vary somewhat in their definition of GHGs, taken together they seek regulation of CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6, water vapor, and soot or black carbon.

consent decree. In its May 30, 2008 notice, EPA decided not to propose adding GHG emission requirements to the Portland cement NSPS for essentially the same reasons the Agency gave in deciding against adding GHG controls to the refinery NSPS.

3. Prevention of Significant Deterioration Permitting

As noted previously, the CAA's PSD program requires new major stationary sources and modified major stationary sources that significantly increase emissions to obtain air pollution permits before construction can begin. As part of the permit issuance process, the public can comment on drafts of these permits. Since the *Massachusetts* decision, the number and scope of issues raised by public comments on draft permits has increased.[27] The main issue that has been raised is whether EPA should be establishing facility-specific emission limits for CO_2 in these permits as a result of the Court's decision. EPA's interpretation, discussed in more detail later in this notice, is that CO_2 is not a regulated pollutant under the Act and that we therefore currently lack the legal authority to establish emission limits for this pollutant in PSD permits. That interpretation has been challenged to EPA's Environmental Appeals Board, and we anticipate a decision in this case later this year.[28] The Appeals Board's decision could also affect several other permits awaiting issuance by EPA, and may have significant implications for the entire PSD program. The broader consequences of CO_2 and other GHGs being classified as a regulated pollutant are discussed later in this notice.

EPA has also received other GHG related comments related to other elements of the PSD program, such as the consideration of GHG emissions in establishing controls for other pollutants, the consideration of alternatives to the proposed project, and related issues. EPA is currently considering these comments in the context of evaluating each PSD permit application on a case-by-case basis, applying current law.

4. GHG Reporting Rule

In EPA's most recent appropriations bill, Congress called on EPA to develop and issue a mandatory GHG emissions reporting rule by the middle of 2009.[29]

Accordingly, EPA is now developing a proposed rule that would collect emissions and emissions-related information from stationary and mobile sources. The overall purpose of the rule is to obtain comprehensive and accurate GHG data relevant to future climate policy decisions, including potential regulation under the CAA. EPA expects the rule to provide valuable additional information on the number and types of U.S. GHG sources and on the GHG emission levels of those sources.

D. Today's Action

In view of the interrelationship of CAA authorities and the many pending CAA actions concerning GHGs before the Agency, EPA decided to issue this ANPR to elicit information that will assist us in developing and evaluating potential action under the CAA. In this ANPR, we review the bases for a potential endangerment finding in the context of the pending petition concerning new motor vehicles, explore interconnections between CAA provisions that could lead to broader regulation of GHG emissions, and examine the full range of potential CAA regulation of GHGs, including a discussion of the issues raised by regulation of GHG emissions of mobile and stationary sources under the Act. The ANPR will help us shape an overall approach for potentially addressing GHG emissions under the CAA as part of a broader set of actions to address GHG emissions taken by Congress, EPA, other federal departments and agencies, state and local governments, the private sector, and the international community.

III. Nature of Climate Change and Greenhouse Gases and Related Issues for Potential Regulation

Much of today's notice is devoted to a detailed examination of the various CAA authorities that might be used to regulate GHG emissions and the scientific and technical bases for potentially exercising those authorities. A key question for EPA is whether and how potentially applicable CAA provisions could be used to regulate GHG emissions in an effective and efficient manner in light of the terms of those provisions. The global nature of climate change, the unique characteristics of GHGs, and the ubiquity of GHG emission sources present special challenges for regulatory design. In this section of the notice, we identify and discuss these and several other important considerations that we believe should inform our examination and potential use of CAA authorities. Throughout this notice we ask for comment on whether particular CAA authorities would allow EPA to develop regulations that address those considerations in an effective and appropriate manner.

A. Key Characteristics of Greenhouse Gases

The six major GHGs of concern are those directly emitted by human activities. These are CO_2, CH_4, N_2O, HFCs, perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6). GHGs have a climatic warming effect by trapping heat in the atmosphere that would otherwise escape to space.

Global emissions of these six GHGs have grown since pre-industrial times and particularly over recent decades, having increased by 70% between 1970 and 2004.[30] In 2000, U.S. GHG emissions accounted for approximately 21% of the global total. Other major emitting countries include China, the Russian Federation, Japan, Germany, India and Brazil. Future projections show that, for most scenarios assuming no additional GHG emission reduction policies, global atmospheric concentrations of GHGs are expected to continue climbing for most if not all of the remainder of this century and to result in associated increases in global average temperature. The Intergovernmental Panel on Climate Change (IPCC) projects an increase of global GHG emissions by 25 to 90% between 2000 and 2030 under a range of different scenarios. For the U.S., under a business as usual scenario, total gross GHG emissions are expected to rise 30 percent between 2000 and 2020.[31]

A significant difference between the major GHGs and most air pollutants regulated under the CAA is that GHGs have much longer atmospheric

[27] Most PSD permits are issued by states under EPA-approved state rules. Other states without approved rules can also issue permits on behalf of EPA under delegation agreements. EPA is the permitting authority in New York, Massachusetts, Washoe Co (Nevada), Puerto Rico, Guam, American Samoa, and the Virgin Islands. EPA also issues PSD permits for sources on tribal lands.

[28] See, In Re Deseret Power Electric Cooperative, PSD Appeal No. 07–03 (*http://www.epa.gov/region8/air/permitting/deseret.html*).

[29] The fiscal year 2008 Consolidated Appropriations Act states that ''not less than $3,500,000 shall be provided for activities to develop and publish a draft rule not later than 9 months after the date of enactment of this Act, and a final rule not later than 18 months after the date of enactment of this Act, to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy * * *.''

[30] The data provided here come from ''Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)''—Summary for Policymakers.

[31] Fourth U.S.Climate Action Report, 2007. *http://www.state.gov/g/oes/rls/rpts/car/*.

lifetimes.[32] Once emitted, GHG can remain in the atmosphere for decades to centuries while traditional air pollutants typically remain airborne for days to weeks. The fact that GHGs remain in the atmosphere for such long periods of time has several important and related consequences:

(1) Unlike most traditional air pollutants, GHGs become well mixed throughout the global atmosphere so that the long-term distribution of GHG concentrations is not dependent on local emission sources. Instead, GHG concentrations tend to be relatively uniform around the world.

(2) As a result of this global mixing, GHGs emitted anywhere in the world affect climate everywhere in the world. U.S. GHG emissions have climatic effects not only in the U.S. but in all parts of the world, and GHG emissions from other countries have climatic effects in the U.S.

(3) Emissions of the major GHGs build up in the atmosphere so that past, present and future emissions ultimately contribute to total atmospheric concentrations. While concentrations of most traditional air pollutants can be reduced relatively quickly (over months to several years) once emission controls are applied, atmospheric concentrations of the major GHGs cannot be so quickly reversed. Once applied, GHG emission controls would first reduce the rate of build-up of GHGs in the atmosphere and, depending on the degree of controls over the longer term, would gradually result in stabilization of atmospheric GHG concentrations at some level.

(4) GHG emissions have long-term consequences. Once emitted, the major GHGs exert their climate changing effects for a long period of time. Past and current GHG emissions thus lead to some degree of commitment to climate change for decades or even centuries. According to the IPCC, past GHG emissions have already resulted in an increase in global average temperature and associated climatic changes. Much of those past emissions will continue to contribute to temperature increases for some time to come, while current and future GHG emissions contribute to climate change over a similarly long period. See section V for a fuller discussion of the effects of GHG emissions as they relate to making an endangerment finding under the CAA.[33]

The large temporal and spatial scales of the climate change challenge introduce regulatory issues beyond those typically presented for most traditional air pollutants. Decision makers are faced with many uncertainties over long time frames and across national boundaries, such as population and economic growth, technological change, the exact rate and magnitude of climate change in response to different emissions pathways, and the associated effects of that climate change. These uncertainties increase the complexity of designing an effective long-term regulatory strategy.

Acknowledging that overall risk increases with increases in both the rate and magnitude of climate change, the United Nations Framework Convention on Climate Change (UNFCCC), signed and ratified by the U.S. in 1992, states as its ultimate objective the ''* * * stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'' In 2007, the U.S. and other Parties to the UNFCCC recognized that ''* * * deep cuts in global emissions will be required to achieve the ultimate objective of the Convention * * *'' and emphasized ''* * * the urgency to address climate change as indicated * * *'' by the IPCC.

Determining what constitutes ''dangerous anthropogenic interference'' is not a purely scientific question; it involves important value judgments regarding what level of climate change may or may not be acceptable. It is not the purpose of this ANPR to make any judgment regarding what an appropriate stabilization goal may be. In the absence of further policy action, the IPCC notes that, ''With current climate change mitigation policies and related sustainable development practices, global GHG emissions will continue to grow over the next few decades.''

As indicated above, to stabilize GHGs at any level in the atmosphere, emissions would need to peak and decline thereafter. A decision to stabilize at lower concentrations and associated temperature increases would necessarily advance the date by which emissions would need to peak, and would therefore require greater emissions reductions earlier in time. According to the IPCC, mitigation efforts over the next two to three decades will have a large impact on the ability of the world to achieve lower stabilization levels. For illustration, IPCC projected that, in order to prevent long-term global temperatures from exceeding 2.8 °C (approximately 5 °F) relative to pre-industrial temperatures, atmospheric CO_2 concentrations would need to be stabilized at 440 parts per million (ppm) (current levels stand at about 379 ppm), translating into global CO_2 emission reductions by 2050 of up to 60% (relative to emissions in the year 2000). Stabilization targets that aim to prevent even more warming would require steeper and earlier emission reductions, whereas stabilization targets that allow for more warming (with higher associated risks and impacts) would require less steep and later emission reductions.

B. Types and Relative Emissions of GHG Emission Sources

1. Background

Each year EPA prepares a complete inventory of the anthropogenic emissions and sinks of all six major GHGs in the United States.[34] Anthropogenic in this context means that emissions result from human activities. ''Sinks'' are the opposite of emissions in that they are activities or processes that remove GHGs from the atmosphere (e.g., CO_2 uptake by plants through photosynthesis). EPA prepares the inventory in cooperation with numerous federal agencies as part of the U.S. commitment under the UNFCCC.[35] This inventory is derived largely from top-down national energy and statistical data. As mentioned previously, EPA is currently developing a proposed GHG reporting rule that will provide bottom-up data from covered reporters and thus provide greater detail on the emissions profile of specific source categories.

2. Emissions by Gas

In 2006, total U.S. GHG emissions were 7,054 million metric tons of CO_2 equivalent ($MMTCO_2e$).[36] Overall, total U.S. GHG emissions have risen by 14.7% from 1990 to 2006. GHG emissions decreased from 2005 to 2006 by 1.1 percent (or 76 $MMTCO_2e$). Figure III–1 illustrates the relative share of each

[32] Some pollutants regulated under the CAA have long atmospheric lifetimes, including those regulated for protection of stratospheric ozone and mercury.

[33] Another important difference between CO_2 and traditional air pollutants is the high volume of CO_2 emissions relative to other pollutants for most sources. The significance of this difference is discussed later in this section and in section VII of this notice.

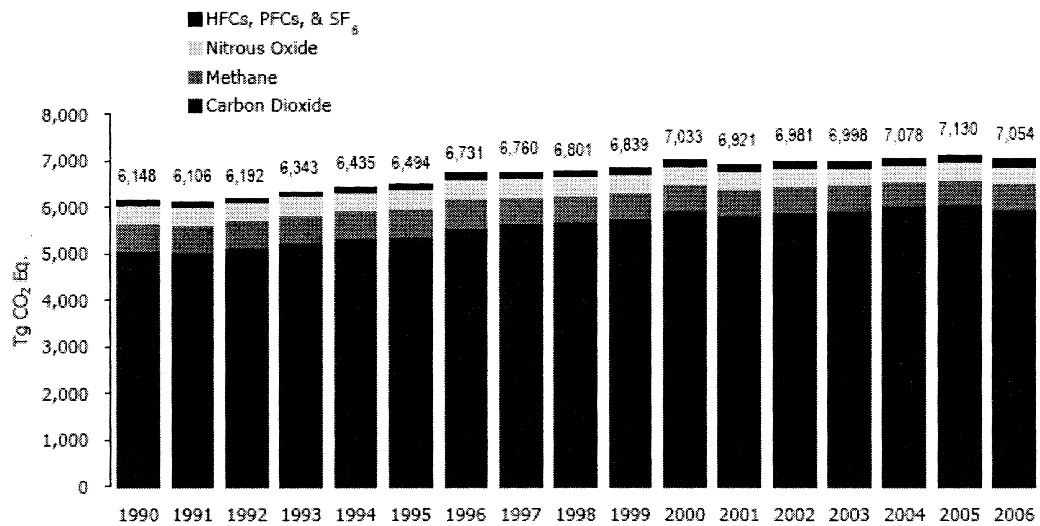
[34] Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006, (April 2008) USEPA #430–R–08–005. *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

[35] See Articles 4 and 12 of the UNFCCC treaty. *http://www.unfccc.int.* Parties to the Convention ''shall develop, periodically update, publish and make available * * * national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies * * *''

[36] International standards for reporting are established by the IPCC, which uses metric units. 1 $MMTCO_2e$ is equal to 1 teragram (Tg) or 10^{12} grams. 1 metric ton is equal to 1.1023 short tons.

gas, and trend since 1990, weighted by global warming potential.[37] All GHG units and percentage changes provided in this section are based on CO_2-equivalency.

Figure III-1



Carbon Dioxide: The primary GHG emitted as a result of human activities in the United States is CO_2, representing approximately 85% of total GHG emissions. CO_2 results primarily from fossil fuel combustion to generate electricity, power vehicles and factories, heat buildings, etc. Fossil fuel-related CO_2 emissions accounted for approximately 79% of CO_2 emissions since 1990, and increased at an average annual rate of 1.1% from 1990 to 2006. Changes in CO_2 emissions from fossil fuel combustion are influenced by many long-term and short-term factors, including population and economic growth, energy price fluctuations, technological changes, and seasonal temperatures.

Methane: According to the IPCC, CH_4 is more than 20 times as effective as CO_2 at trapping heat in the atmosphere. By 2006, CH_4 emissions had declined from 1990 levels by just under 9%, and now make up approximately 8% of total U.S. GHG emissions. Enteric fermentation (22.7%) is the largest anthropogenic source of CH_4 emissions in the United States, followed by landfills (22.6%), natural gas systems (18.4%), coal mining (10.5%), and manure management (7.5%). Smaller sources such as rice cultivation and incomplete fossil fuel combustion account for the remainder.

Nitrous Oxide: While total N_2O emissions are much lower than CO_2 emissions in terms of mass, N_2O is approximately 300 times more powerful than CO_2 at trapping heat in the atmosphere. U.S. emissions of N_2O are just over 5% of total U.S. GHG emissions, and have declined by 4% since 1990. The main anthropogenic activities producing N_2O in the United States are agricultural soil management (72%), and fuel combustion in motor vehicles (9%). A variety of chemical production processes and liquid waste management sources also emit N_2O.

HFCs, PFCs, and SF_6: These GHGs are often grouped together because they contain fluorine, typically have large global warming potentials, and are produced only through human activities (there are no natural sources), either intentionally for use or unintentionally as an industrial byproduct. HFCs and some PFCs are increasingly being used—and therefore emitted—as substitutes for the ozone depleting substances controlled under the Montreal Protocol and Title VI of the CAA. The largest source is the use of HFCs in air conditioning and refrigeration systems. Other sources include HFC–23 emitted during the production of HCFC–22, electrical transmission and distribution systems (SF_6), and PFC emissions from semiconductor manufacturing and primary aluminum production. U.S. HFC emissions have increased 237% over 1990 levels, while emissions of PFCs and SF_6 have decreased by 71 and 47%, respectively, from 1990 levels. Combined, these GHGs made up 2.1% of total U.S. GHG emissions in 2006.

3. Emissions by Sector

An alternative way to look at GHG emissions is by economic sector. All U.S. GHG sources can be grouped into the electricity, industrial, commercial, residential, transportation and agriculture sectors. Additionally, there are changes in carbon stocks that result in emissions and sinks associated with land-use and land-use change activities. Figure III–2 illustrates the relative contributions and historical trends of these economic sectors.

Electricity Generation: The electricity generation sector includes all facilities that generate electricity primarily for sale rather than for use on site (e.g., most large-scale power plants). Electricity generators emitted 33.7% of all U.S. GHG emissions in 2006. The type of fuel combusted by electricity generators has a significant effect on

[37] Emissions of different GHGs are compared using global warming potentials (GWPs). The GWP of a GHG is the ratio of heat trapped by one unit mass of the GHG compared to that of one unit mass of CO_2 over a specified time period, which is 100 years for the GWPs estimated by the IPCC used here. The reference gas is CO_2, and therefore GWP-weighted emissions are measured in teragrams of CO_2 equivalent (Tg CO_2 Eq.). The GWP values used in this analysis come from the IPCC Second Assessment report, consistent with the UNFCCC reporting requirements for Parties listed in Annex I.

their emissions. For example, some electricity is generated with low or no CO_2 emitting energy technologies, particularly non-fossil options such as nuclear, hydroelectric, or geothermal energy. However, over half of the electricity in the U.S. is generated by burning coal, accounting for 94% of all coal consumed for energy in the U.S. in 2006.

Transportation Sector: The transportation sector includes automobiles, airplanes, railroads and a variety of other sources. Transportation activities (excluding international bunker fuels) accounted for approximately 28% of all GHG emissions in 2006, primarily through the combustion of fossil fuels.[38] Virtually all of the energy consumed in this end-use sector came from petroleum products. Over 60% of the CO_2 emissions resulted from gasoline consumption for personal vehicle use.

Industrial Sector: The industrial sector includes a wide variety of facilities engaged in the production and sale of goods. The largest share of emissions from industrial facilities comes from the combustion of fossil fuels. Emissions of CO_2 and other GHGs from U.S. industry also occur as a result of specialized manufacturing processes (e.g., calcination of limestone in cement manufacturing). The largest emitting industries tend to be the most energy intensive: Iron and steel, refining, cement, lime, chemical manufacturing, etc. Overall, 19.4% of total U.S. GHG emissions came from the industrial sector in 2006.

Residential and Commercial Sectors: These two sectors directly emit GHGs primarily through operation and maintenance of buildings (i.e., homes, offices, universities, etc.). The residential and commercial end-use sectors accounted for 4.8 and 5.6% of total emissions, respectively, with CO_2 emissions from consumption of natural gas and petroleum for heating and cooking making up the largest share.

Agriculture Sector: The agriculture sector includes all activities related to cultivating soil, producing crops, and raising livestock. Agricultural GHG emissions result from a variety of processes, including: Enteric fermentation in domestic livestock, livestock manure management, rice cultivation, agricultural soil management, and field burning of agricultural residues. Methane and N_2O are the primary GHGs emitted by agricultural activities.[39] In 2006, agriculture emission sources were responsible for 6.4% of total U.S. GHG emissions.

Land Use, Land-Use Change, and Forestry: Land use is not an economic sector per se but affects the natural carbon cycle in ways that lead to GHG emissions and sinks. Included in this category are emissions and sequestration of CO_2 from activities such as deforestation, afforestation, forest management and management of agricultural soils. Emissions and sequestration depend on local conditions, but overall land use in the U.S. was a net sink in 2006 equivalent to 12.5% of total GHG emissions.

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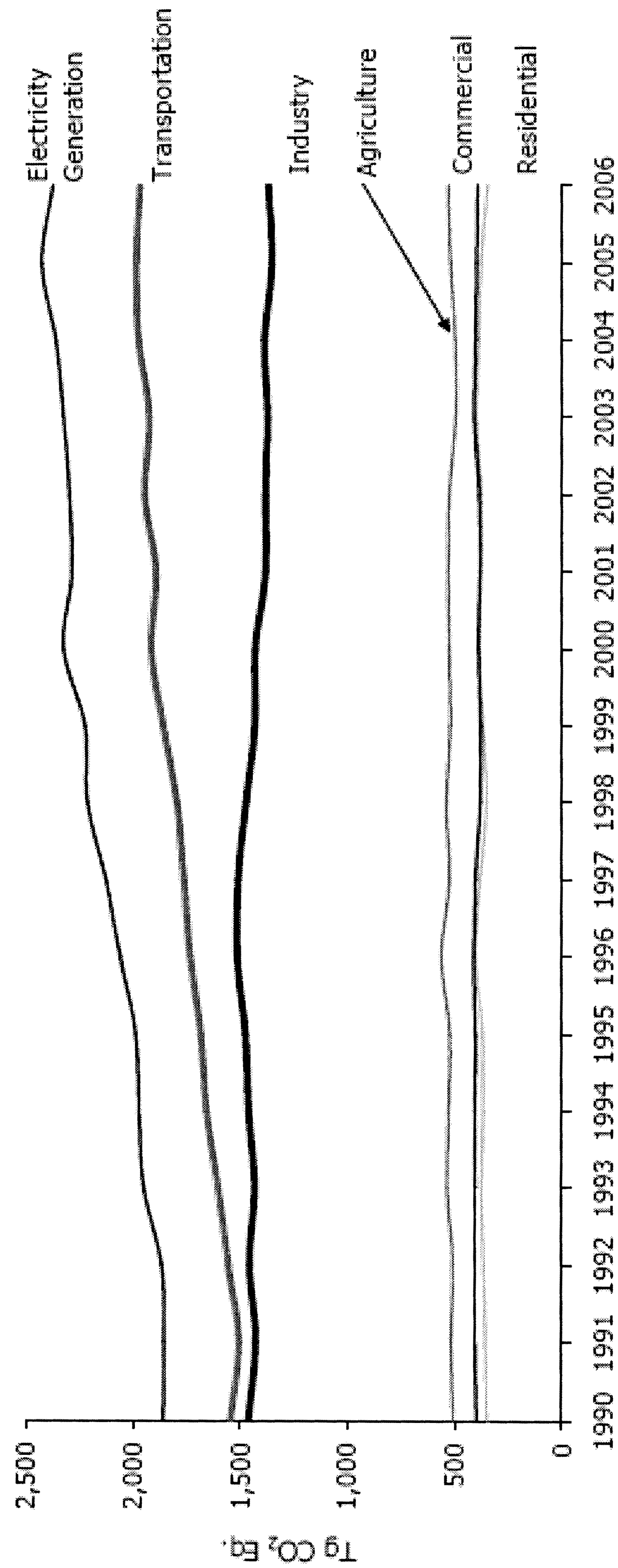
[38] International bunker fuels are used in aviation and marine trips between countries.

[39] Agricultural soils also emit CO_2 and sequester carbon. The fluxes are discussed under the Land-Use, Land-Use Change and Forestry section because of the integrated nature of methodological approaches to the carbon cycle, and international reporting conventions.

Figure III-2



C. Advancing Technology

President Bush, the IPCC, and many other private and public groups have spotlighted the critical importance of technology to reducing GHG emissions and the risks of climate change. International, U.S., and private studies have identified a broad range of potential strategies that can reduce emissions from diverse economic sectors. Many strategies, such as increasing energy efficiency and conservation and employing hybrid and diesel vehicle technologies, are available today. There is also broad consensus that for many sectors of the economy new technologies will be needed to achieve deep reductions in GHG emissions at less cost than today's technologies alone can achieve.

In developing potential CAA (or other) controls, one important question is the extent to which needed technological development can be expected to occur as a result of market forces alone (e.g., as a result of increasing prices for oil and other fossil fuels), and the extent to which government or other action may be needed to spur development. There are several different pathways for technological change, including investment in research and development (private and public), spillovers from research and development in other sectors (e.g., advances in computing made hybrid vehicles possible), learning by doing (i.e., efficiency gains through repetition), and scale economies (i.e., aggregate cost reductions from improved process efficiencies). As further discussed later in this section, market-based incentives that establish a price (directly or indirectly through a limit) for carbon and/or other GHGs could continuously spur technological innovation that could lower the cost of reducing emissions. However, even with such a policy, markets tend to under-invest in development of new technologies when investors can only capture a portion of the returns. This is particularly true at the initial stages of research and development when risks are high and market potential is not evident. In such cases, policies to encourage the development and diffusion of technologies that are complements to pollution control policies may be warranted.[40]

This section draws insights from IPCC and other reports on available and needed technologies. In later sections of this notice, we explain each potentially applicable CAA provision and consider the extent to which that provision authorizes regulatory actions and approaches that could spur needed technology development.

[40] Economic Report of the President, February 2007.

1. The Role of Existing and New Technology in Addressing Climate Change

The 2007 IPCC report on mitigation of climate change examined the availability of current technologies and the need for new technologies to mitigate climate change.[41] Among its conclusions, the IPCC states:

- The range of stabilization levels assessed [by the IPCC] can be achieved by deployment of a portfolio of technologies that are currently available and those that are expected to be commercialized in coming decades. This assumes that appropriate and effective incentives are in place for development, acquisition, deployment and diffusion of technologies and for addressing related barriers.[42]

According to one study, five groups of strategies that could substantially reduce emissions between now and 2030 include (1) improving energy efficiency in buildings and appliances; (2) increasing fuel efficiency and reducing GHG emissions from vehicles and the carbon intensity of transportation fuels; (3) industrial equipment upgrades and process changes to improve energy efficiency; (4) increasing forest stocks and improving soil management practices; and (5) reducing carbon emissions from electric power production through a shift toward renewable energy, expanded nuclear capacity, improved power plant efficiency, and use of carbon capture and storage technology on coal-fired generation.[43] (Note that EPA is not rank-ordering these technologies by their relative cost effectiveness.) As noted elsewhere in this notice, there is federal regulatory or research and development activity ongoing in most of these areas.

[41] IPCC, 2007, ''Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,'' [B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyers (eds)], Cambridge University Press, Cambridge, United Kingdom and New York, NY.

[42] Ibid, ''Summary for Policymakers,'' p. 25.

[43] See McKinsey & Company, ''Reducing U.S. Greenhouse Gas Emissions: How Much at What Cost?'', U.S. Greenhouse Gas Abatement Mapping Initiative, Executive Report, December 2007. This study performed an economic assessment of potential control methods based on a ''bottom-up'' partial equilibrium model, which does not account for interactions among economic sectors. Bottom-up models include many more specific technologies than ''top-down'' general equilibrium models, which account for cross-sector interactions.

Many energy efficiency technologies exist that appear to be extremely cost-effective in reducing fuel costs compared to other alternatives. However, they have yet to be adopted as widely as expected because of market barriers. Such barriers include lack of knowledge or confidence in the technology by potential users, uncertainty in the return on investment (potentially due to uncertainty in either input prices or output prices), concerns about effects of energy efficiency technologies on the quality of inputs or outputs, size of the initial capital investment (coupled with potential liquidity constraints), and requirements for specialized human capital investments. Some of these costs are lower in larger firms, due to the increased availability of financial resources and human capital.[44] Vendor and other projections of cost-savings for energy efficiency technologies are often based on average pay-back and thus do not reflect differences among firms that can affect the costs and benefits of these technologies and therefore the likelihood of adoption. Over time, as firms gain more experience with these technologies, the rate of adoption will likely increase if significant cost-savings are realized by early adopters.

The IPCC report on mitigation identified technologies that are currently available and additional technologies that are expected to be commercialized by 2030, as shown in the following table.[45] These include technologies and practices in the energy supply, transportation, buildings, industry, agriculture, forest, and waste sectors:

[44] Pizer, et al., ''Technology Adoption and Aggregate Energy Efficiency,'' December 2002, December 2002 Resources for the Future Discussion Paper 02–52.

[45] IPCC 2007, ''Summary for Policymakers,'' p. 14.

Figure III-3

Summary for Policymakers

***Table SPM 3:** Key mitigation technologies and practices by sector. Sectors and technologies are listed in no particular order. Non-technological practices, such as lifestyle changes, which are cross-cutting, are not included in this table (but are addressed in paragraph 7 in this SPM).*

Sector	Key mitigation technologies and practices currently commercially available.	Key mitigation technologies and practices projected to be commercialized before 2030.
Energy Supply [4.3, 4.4]	Improved supply and distribution efficiency; fuel switching from coal to gas; nuclear power; renewable heat and power (hydropower, solar, wind, geothermal and bioenergy); combined heat and power; early applications of CCS (e.g. storage of removed CO_2 from natural gas)	Carbon Capture and Storage (CCS) for gas, biomass and coal-fired electricity generating facilities; advanced nuclear power; advanced renewable energy, including tidal and waves energy, concentrating solar, and solar PV.
Transport [5.4]	More fuel efficient vehicles; hybrid vehicles; cleaner diesel vehicles; biofuels; modal shifts from road transport to rail and public transport systems; non-motorised transport (cycling, walking); land-use and transport planning	Second generation biofuels; higher efficiency aircraft; advanced electric and hybrid vehicles with more powerful and reliable batteries
Buildings [6.5]	Efficient lighting and daylighting; more efficient electrical appliances and heating and cooling devices; improved cook stoves, improved insulation ; passive and active solar design for heating and cooling; alternative refrigeration fluids, recovery and recycle of fluorinated gases	Integrated design of commercial buildings including technologies, such as intelligent meters that provide feedback and control; solar PV integrated in buildings
Industry [7.5]	More efficient end-use electrical equipment; heat and power recovery; material recycling and substitution; control of non-CO_2 gas emissions; and a wide array of process-specific technologies	Advanced energy efficiency; CCS for cement, ammonia, and iron manufacture; inert electrodes for aluminium manufacture
Agriculture [8.4]	Improved crop and grazing land management to increase soil carbon storage; restoration of cultivated peaty soils and degraded lands; improved rice cultivation techniques and livestock and manure management to reduce CH_4 emissions; improved nitrogen fertilizer application techniques to reduce N_2O emissions; dedicated energy crops to replace fossil fuel use; improved energy efficiency	Improvements of crops yields
Forestry/forests [9.4]	Afforestation; reforestation; forest management; reduced deforestation; harvested wood product management; use of forestry products for bioenergy to replace fossil fuel use	Tree species improvement to increase biomass productivity and carbon sequestration. Improved remote sensing technologies for analysis of vegetation/ soil carbon sequestration potential and mapping land use change
Waste [10.4]	Landfill methane recovery; waste incineration with energy recovery; composting of organic waste; controlled waste water treatment; recycling and waste minimization	Biocovers and biofilters to optimize CH_4 oxidation

How much any of the mitigation strategies identified by these studies would actually be deployed to address climate change is an open question. It is possible that unanticipated technologies could play a significant role in reducing emissions. The point of these studies is to illustrate that potentially feasible technologies exist that could be employed to mitigate GHG emissions, not to predict the precise role they will play or to suggest sectors or methods for regulation. The particular policies pursued by governments, including the U.S. under the CAA or other authorities, will influence the way in which these technologies are deployed as well as incentives for developing and deploying new technologies.

2. Federal Climate Change Technology Program

The U.S. government is investing in a diverse portfolio of technologies with the potential to yield substantial reductions in emissions of GHGs. The Climate Change Technology Program (CCTP) is a multi-agency planning and coordination entity that assists the government in carrying out the President's National Climate Change Technology Initiative. Managed by the Department of Energy, the program is organized around five technology areas for which working groups were established. EPA participates in all of the working groups and chairs the group focused on non-CO_2 GHGs.

The CCTP strategic plan, released in September 2006, provides strategic direction and organizes approximately $3 billion in federal spending for climate change-related technology research, development, demonstration, and deployment.[46] The plan sets six complementary goals, including five aimed at developing technologies to:

- Reduce emissions from energy end-use and infrastructure;
- Reduce emissions from energy supply, particularly through development and commercialization of no- or low-emission technologies;
- Capture, store and sequester CO_2;
- Reduce emissions of non-CO_2 GHGs; and
- Enhance the measurement and monitoring of CO_2 emissions.

The first four of these goals focus on GHG emissions reduction technologies, and the fifth addresses a key need for developing comprehensive GHG control strategies. The sixth CCTP goal is to strengthen the contributions of basic science to climate change technology development.

3. Potential for CAA Regulation to Encourage Technology Development

Past EPA efforts to reduce air pollution under the CAA demonstrate that incentives created by regulation can help encourage technology development and deployment. As noted in a recent EPA regulatory analysis, the history of the CAA provides many examples in which technological innovation and ''learning by doing'' have made it possible to achieve greater emissions reductions than had been feasible earlier, or have reduced the costs of emission control in relation to original estimates.[47] Among the examples are motor vehicle emission controls, diesel fuel and engine standards to reduce NO_X and particulate matter emissions, engine idle-reduction technologies, selective catalytic reduction and ultra-low NO_X burners for NO_X emissions, high-efficiency scrubbers for SO_2 emissions from boilers, CFC-free air conditioners and refrigerators, low or zero VOC paints, and idle-reduction technologies for engines.[48]

One of the issues raised by potential CAA regulation of GHGs is whether the CAA can help spur needed technological development for reducing GHG emissions and the costs of those reductions. The regulatory authorities in the CAA vary in their potential for encouraging new technology. As discussed later in this notice, some provisions offer little flexibility in standard-setting criteria, emission control methods, compliance deadlines and potential for market-oriented regulation. Other provisions offer more potential to encourage new technology through market incentives or to establish standards based on anticipated advances in technology. EPA requests comment on the extent to which various CAA provisions could be used to help spur technological development, and on the need for federally conducted or funded research to promote technological development.

D. Relationship to Traditional Air Pollutants and Air Pollution Controls

An issue for any regulation of GHGs under the CAA or other statutory authority is how a GHG control program would and should interact with existing air quality management programs. This section describes the relationships between climate change and air quality and between GHG emissions and traditional air pollution control programs. As explained below, those relationships suggest the need for integrated approaches to climate change mitigation and air quality protection. Differences between GHGs and traditional air pollutants should also be taken into account in considering how CAA authorities could be employed for GHG regulation.

1. Connections Between Climate Change and Air Quality Issues

Climate change affects some types of air pollution, and some traditional air pollutants affect climate. According to the IPCC, climate change can be expected to influence the concentration and distribution of air pollutants through a variety of direct and indirect processes. In its recent review of the NAAQS for ozone, EPA examined how climate change can increase ozone levels and how ozone, itself a GHG, can contribute to climate change. Similarly, in its reviews of the NAAQS for particulate matter, the Agency examined the extent to which some particles help absorb solar energy in the earth's atmosphere and others help reflect it back to space.[49] How EPA regulates those pollutants under the CAA is potentially part of an overall strategy for addressing climate change, and how GHGs are regulated is potentially an important component of protecting air quality. For example, it is likely to become more difficult and expensive to attain the ozone NAAQS in a future, warmer climate.

Most of the largest emitters of GHGs are also large emitters of traditional air pollutants and therefore are already regulated under the CAA. The electricity generation, transportation and industrial sectors, the three largest contributors to GHG emissions in the U.S., are subject to CAA controls to help meet NAAQS, control acid rain, and reduce exposures to toxic emissions. Some manufacturers of the GHGs that are fluorinated gases are subject to CAA regulations for protection of the stratospheric ozone layer.

Many measures for controlling GHG emissions also contribute to reductions in traditional air pollutants, and some measures for controlling traditional air pollutants result in reductions in GHGs.[50] Co-benefits from reduced air pollution as a result of actions to reduce GHG emissions can be substantial.[51] In general, fossil fuel combustion results in emissions not only of CO_2 but also of many traditional air pollutants, including SO_2, NO_X, CO and various toxic air pollutants. For many types of sources, to the extent fossil fuel combustion is reduced, emissions of all those pollutants are reduced as well. Some control measures reduce GHGs and traditional air pollutants, including leak detection and fuel switching. However, some measures for controlling traditional air pollutants increase GHGs, and some measures for controlling GHGs may increase traditional air pollutants. For example, controls to decrease SO_2 emissions from industrial sources require energy to operate and result in reduced process efficiencies and increases in GHGs, and changing

[46] U.S. Climate Change Technology Program Strategic Plan, September 2006; *http://www.climatetechnology.gov/stratplan/final/index.htm.*

[47] See section 5.4 of *Final Ozone NAAQS Regulatory Impact Analysis,* March 2008, EPA–HQ–OAR–2007–0225. The RIA is available at *http://www.epa.gov/ttn/ecas/ria.html#ria2007.*

[48] Ibid.

[49] EPA did not have adequate information in these reviews for impacts on climate change to change the Agency's decision on whether or how to revise the standards. *See,* e.g., 71 FR 61144, 61209–10 (October 17, 2006) (PM NAAQS review).

[50] EPA, OAP, Clean Energy-Environmental Guide to Act, *http://www.epa.gov/cleanenergy/documents/gta/guide_action_full.pdf.*

[51] IPCC, 2007, Working Group III, Summary for Policymakers.

the composition of transportation fuels to reduce GHGs may affect traditional air pollutant emissions.

By considering policies for addressing GHGs and traditional air pollutants in an integrated manner, EPA and the sectors potentially subject to GHG emission controls would also have the opportunity to consider and pursue the most effective way of accomplishing emission control across pollutants. For example, adoption of some air quality controls could result in a degree of ''technology lock-in'' that restricts the ability to implement GHG control technologies for significant periods of time because of the investment in capital and other resources to meet the air quality control requirements. Sections VI and VII below discuss technologies and opportunities for controlling GHGs in more detail from various sectors, including transportation, electricity generation, and manufacturing. EPA requests comment on strategies and technologies for simultaneously achieving reductions in both traditional air pollutants and GHG emissions.

In light of the connections between climate change and air quality, the large overlap of GHG and traditional air pollution sources, and the potential interactions of GHG and traditional air pollution controls, it makes sense to consider regulation of GHGs and traditional air pollutants in an integrated manner. Indeed, the National Academy of Sciences recommends that development of future policies for air pollution control be integrated with climate change considerations.[52] GHG control measures implemented today could have immediate impacts on air pollution and air quality. Similarly, air pollution controls implemented today could have near term impacts on GHG emissions and thus long term impacts on climate. Ideally, any GHG control program under the Act, or other statutory authority would address GHGs in ways that simultaneously reduce GHGs and traditional air pollutants as needed to mitigate climate change and air pollution.[53]

2. Issues in Applying CAA Controls to GHGs

One important issue for regulation of GHGs under some CAA provisions concerns the emissions thresholds established by the Act for determining the applicability of those provisions. Several CAA provisions require stationary sources that emit traditional air pollutants above specific emission thresholds to comply with certain requirements. Applying the same thresholds to GHGs could result in numerous sources, such as space heaters in large residential and commercial buildings, becoming newly subject to those requirements. Currently regulated sources could become subject to additional requirements. This would occur in part because most sources typically emit CO_2, the predominant GHG, in much larger quantities than traditional air pollutants. Issues related to threshold levels are discussed in more detail in Section VII below.

Other important issues for CAA regulation of GHGs are raised by the different temporal and spatial scope of GHGs compared to traditional pollutants. Air pollutants currently regulated under the CAA tend to have local (a few kilometers) or regional (hundreds to thousands of kilometers) impacts and relatively short atmospheric lifetimes (days to a month). Historically, this has meant that EPA could identify and differentiate between affected and unaffected areas and devise control strategies appropriate for each area. Controls applied within an area with high concentrations of traditional air pollutants generally have been effective in achieving significant reductions in air pollution concentrations within that area in a relatively short amount of time. The spatial nature of traditional air pollution also has made it appropriate to place the primary responsibility for planning controls on state, tribal, or local governments.

In the years since the CAA was enacted, we have learned that some traditional air pollutants (*e.g.*, ozone, particulates and their precursors) are transported across regions of the country and thus have geographically broader impacts than individual states can address on their own. Our control strategies for those pollutants have evolved accordingly. The Nitrogen Oxides (NO_X) SIP Call Rule and the Clean Air Interstate Rule (CAIR) are examples of regional control programs that significantly supplement local control measures. NSPS and motor vehicle controls are examples of national measures that also help improve air quality locally and regionally.

The global nature and effect of GHG emissions raise questions regarding the suitability of CAA provisions that are designed to protect local and regional air quality by controlling local and regional emission sources.[54] As noted above, GHGs are relatively evenly distributed throughout the global atmosphere. As a result, the geographic location of emission sources and reductions are generally not important to mitigating global climate change. Instead, total GHG emissions in the U.S. and elsewhere in the world over time determine cumulative global GHG concentrations, which in turn determine the extent of climate change. As a result, it will be the total emission reductions achieved by the U.S. and the other countries of the world that will determine the extent of climate change mitigation. The global nature of GHGs suggests that the programmatic and analytical tools used to address local and regional pollutants under the CAA (e.g., SIPs, monitoring networks, and models) would need to be adapted to inventory, analyze, control effectively and evaluate progress in achieving GHG reductions.

EPA seeks information about how differences in pollutant characteristics should inform regulation of these pollutants under the CAA. EPA also requests comment on the types of effective programs at all levels (local, regional, national and international) that may be feasible to design and implement under existing CAA authorities.

E. Relationship to Other Environmental Media

An effective GHG control program may require application of many technologies and approaches that may in turn result in increased discharges to water, generation of solid materials that require appropriate disposal, or have other impacts to the environment that may not be addressed under the CAA. Examples of these impacts include the potential for groundwater contamination from geological

[52] National Academy of Sciences, ''Radiative Forcing of Climate Change: Expanding the Concept and Addressing Uncertainties,'' October 2005.

[53] Integration of planning efforts related to air quality, land use, energy efficiency, and transportation to improve air quality and reduce GHG emissions is in line with the CAA Advisory Committee Air Quality Management Subcommittee's Phase II recommendations (June 2007), and the recommendations of the National Research Council of the National Academy of Sciences in its January 2004 report, ''Air Quality Management in the United States.'' EPA has initiated several programs to encourage integrated planning efforts, including the Sustainable Skylines Initiative, a public-private partnership to reduce air emissions and promote sustainability in urban environments, and the Air Quality Management Plan pilot program for testing a comprehensive, multipollutant planning approach.

[54] It should be noted that international transport of ozone and particulate matter precursors contributes to NAAQS nonattainment in some areas of the U.S. Nevertheless, most traditional air pollution problems are largely the result of local and regional emission sources, while for GHGs, worldwide emissions determine the extent of the problem.

sequestration of CO_2, the generation of spent sorbent material from carbon capture systems, or the depletion of water resources and increased nutrient runoff into surface waters from increased production of bioenergy feedstocks. EPA and other regulatory agencies at the tribal, state, and local level may need to respond to such impacts to prevent or minimize their impact to the environment and public health under authorities other than the CAA.

Since the nature and extent of these impacts would depend upon the technologies and approaches that are implemented under a GHG control program, an important consideration in designing GHG controls is minimizing or mitigating such impacts EPA seeks comment on how different regulatory approaches to GHG control under the CAA could result in environmental impacts to water or land that could require response under the CAA or EPA's other legislative authorities.

F. Other Key Policy and Economic Considerations for Selecting Regulatory Approaches

This section identifies general policy considerations relevant to developing potential regulatory approaches for controlling GHG emissions. In developing approaches under the CAA, EPA must first consider the Act's provisions as well as the Agency's previous interpretation of the provisions and relevant and controlling court opinions. Provisions of the CAA vary in terms of the degree of flexibility afforded EPA in designing implementing regulations under the Act. To the extent particular provisions permit, EPA believes the following considerations should guide its choice among available regulatory approaches. This section also discusses three selected issues in greater depth because of their importance to designing effective GHG controls: advantages of market-oriented regulatory approaches, economy-wide and sector-based regulation under the CAA, and emissions leakage and international competitiveness. In discussing these and other policy and economic considerations, EPA is not directly or indirectly implying that it possesses the requisite statutory authority in all areas.

1. Overview of Policy and Economic Considerations

The following considerations are useful in developing potential regulatory approaches to the extent permissible under the CAA. These considerations are also generally applicable to the design of GHG control legislation. EPA is in the process of evaluating the CAA options described later in this notice in light of these considerations.

Effectiveness of health and environmental risk reduction: How much would the approach reduce negative health and environmental impacts (or the risk of such impacts), relative to other potential approaches?

Certainty and transparency of results: How do the potential regulatory approaches balance the trade-off between certainty of emission reductions and costs? To what extent can compliance flexibility be provided for regulated entities while maintaining adequate accountability for emission reductions?

Cost-effectiveness and economic efficiency considerations: To what extent does the approach allow for achieving health and environmental goals, determined in a broader policy process, in a manner that imposes the least cost? How do the societal benefits compare to the societal costs? To what extent are there non-monetizable or unquantifiable benefits and costs? Given the uncertainties associated with climate change, to what extent can economic efficiency be judged?

Equity considerations (i.e., distributional effects): Does the approach by itself or in combination with other programs result in a socially acceptable apportionment of the burden of emission reduction across groups in our society? Does the approach provide adequate protection for those who will experience the adverse effects of emissions, including future generations?

Policy flexibility over time: Does the approach allow for updating of environmental goals and mechanisms for meeting those goals as new information on the costs and benefits of GHG emission reductions becomes available?

Incentives for innovation and technology development: Does the approach provide incentives for development and deployment of new, cleaner technologies in the United States and transfer abroad? Does the approach create incentives for individual regulated entities to achieve greater-than-required emissions reductions?

Competitiveness/emissions shifts: Can the approach be designed to reduce potential adverse impacts and consequent shifts in production and emissions to other sectors or geographic areas? Can the policy be designed to minimize the shifting, or ''leakage,'' of emissions to other sectors or other countries, which would offset emission reduction benefits of the policy? To what extent can the approach consider the degree and nature of action taken by other countries?

Administrative feasibility: How complex and resource-intensive would the approach be for federal, state, and local governments and for regulated entities? Do personnel in the public and private sectors have sufficient expertise, or can they build sufficient expertise, to successfully implement the approach?

Enforceability: Is the approach enforceable in practice? Do available regulatory options differ regarding whether the government or the regulated entity bears the burden of demonstrating compliance?

Unintended consequences: Does the approach result in unintended consequences or unintended effects for other regulations? Does the approach allow for consideration of, and provide tools to address, any perverse incentives?

Suitability of tool for the job: Overall, is the approach well-suited to the environmental problem, or the best-suited among imperfect alternatives? For example, does the regulatory approach fit the characteristics of the pollutant in question (e.g., the global and long-lived nature of GHGs, high volume of CO_2 emissions)?

2. Market-Oriented Regulatory Approaches for GHGs

EPA believes that market-oriented regulatory approaches, when well-suited to the environmental problem, offer important advantages over non-market-oriented approaches. A number of theoretical and empirical studies have shown these advantages.[55] In general, market-oriented approaches include ways of putting a price on emissions through a fixed price (e.g., a tax) or exchangeable quantity-based instrument (e.g., a cap-and-trade program), while non-market-oriented approaches set performance standards limiting the rate at which individual entities can emit, or prescribe what abatement behaviors or technologies they should use.[56] The primary regulatory advantage of a market-oriented approach is that it can achieve a particular emissions target at a lower

[55] See EPA (2000), Baumol and Oates (1988), Tietenberg (2006) and Burtraw et al. (2005) for a detailed description of the advantages of market-oriented policies, such as the Title IV sulfur dioxide trading program, over non-market-oriented approaches.

[56] Performance standards provide a source flexibility to use any emission reduction method that meets the performance standard; they can be coupled with market-oriented approaches such as emissions trading to promote lower costs and technology innovation, as described later in this section.

social cost than a non-market-oriented[57] approach (Baumol and Oates, 1971; Tietenberg, 1973).[58] This is because market-oriented approaches leave the method for reducing pollution to the emitter, and emitters have an incentive to find the least cost way of achieving the regulatory requirement. Efficient market-oriented regulatory systems provide a common emissions price for all emitters that contribute to a particular harm, either through the tax on emissions or the price of an exchangeable right to emit. As a result, the total abatement required by the policy can theoretically be distributed across all emitters in such a way that the marginal cost of control is equal for all emitters and the cost of reducing emissions is minimized.[59] Non-market-oriented policies offer emitters fewer choices on how to reduce emissions, which can lead to higher costs than are necessary to achieve the overall environmental objective (i.e. emission level).

As noted previously, it is especially important that any GHG emission reduction policy encourage the innovation, development and diffusion of technologies to provide a steady decline in the costs of emission reductions. Another advantage of market-oriented approaches is that they generally provide a greater incentive to develop new ways to reduce pollution than non-market-oriented approaches (Malueg 1989; Milliman and Prince 1989; Jung et al., 1996). Polluters not only have an incentive to find the least cost way of adhering to a standard but they also have an incentive to continually reduce emissions beyond what is needed to comply with the standard. For every unit of emissions reduced under a market-oriented policy, the emitter either has a lower tax burden or can sell an emissions permit (or buy one less emissions permit). Also, there are more opportunities under a market-oriented approach for developers of new control technologies to work directly with polluters to find less expensive ways to reduce emissions, and polluters are faced with less compliance risk if a new pollution control technique does not work as expected. This is because they can either pay for their unanticipated emissions through the tax or by purchasing emission rights instead of being subject to enforcement action (Hahn, 1989).

There are a number of examples of CAA rules in which market-oriented approaches have been used for groups of mobile or stationary sources. Usually this has taken the form of emissions trading within a sector or subsector of a source category, although there are some examples of broader trading programs. Differences in implications of sector-specific and economy-wide market-oriented systems are discussed in subsection below.

The cost advantage of market-oriented policies can be extended when emitters are allowed to achieve a particular environmental objective across multiple pollutants that affect environment quality in the same way but differ in the magnitude of that effect (e.g., different GHGs have different global warming potentials). Either a cap-and-trade or a tax approach could be designed so that the effective price per unit of emissions is higher for those pollutants that have a greater detrimental effect. Under a cap, the quantity of emissions reductions is fixed but not the price; under a tax, the price is fixed but not the emissions reductions. Some current legislative proposals include flexible multiple-pollutant market-oriented policies for the control of GHG emissions.

Market-oriented approaches are relatively well-suited to controlling GHG emissions. Since emissions of the major GHGs are globally well-mixed, a unit of GHG emissions generally has the same effect on global climate regardless of where it occurs. Also, while policies can control the flow of GHG emissions, what is of ultimate concern is the concentration of cumulative GHGs in the atmosphere. Providing flexibility on the method, location and precise timing of GHG reduction would not significantly affect the global climate protection benefits of a GHG control program (assuming effective enforcement mechanisms), but could substantially reduce the cost and encourage technology innovation.[60] However, it should be noted that for GHG control strategies that also reduce emissions of traditional pollutants, the timing and location of those controls could significantly affect air quality in local or regional areas. There is the potential for positive air quality effects from strategies that reduce both GHGs and traditional pollutants, and for adverse air quality effects that may be avoidable through complementary measures to address air quality. For example, when the acid rain control program was instituted, existing sulfur dioxide control programs were left in place to ensure that trading under the acid rain program did not undermine achievement of local air quality objectives.

As noted previously, broad-based market-oriented approaches include emissions taxes and cap-and-trade programs with and without cost containment mechanisms. While economists disagree on which of these approaches—emissions taxes or cap-and-trade programs—may be particularly well-suited to the task of mitigating GHG emissions, they do agree that attributes such as flexibility, cost control, and broad incentives for minimizing abatement costs and developing new technologies are important policy design considerations.[61] For a description of various market-oriented approaches, see section VII.G.

3. Legal Authority for Market-Oriented Approaches Under the Clean Air Act

The ability of each CAA regulatory authority potentially applicable to GHGs to support market-oriented regulatory approaches is discussed in sections VI and VII of this notice. To summarize, some CAA provisions permit or require market-oriented approaches, and others do not. Trading programs within sectors or subsectors have been successfully implemented for a variety of mobile and stationary source categories under the Act, including the Acid Rain Control Program (58 FR 3590 (Jan. 11, 1993)) and a variety of on-road and non-road vehicle and fuel rules. Multi-sector trading programs, though not economy-wide, have been successfully implemented under section 110(a)(2)(D) for nitrogen oxides (i.e. the NO_X SIP Call Rule) and under Title VI for ozone-depleting substances, and may be

[57] Many studies use the term ''command-and-control'' to refer to non-market-oriented approaches. Here we use the term ''non-marketed-oriented'' because the term ''command and control'' may be misleading when used to refer to performance-based emission limits that allow the regulated entity to choose the control technology or strategy for compliance.

[58] It is important to note that judgments about the appropriate mitigation approach also may consider important societal values not fully captured in economic analysis, such as political, legal, and ethical considerations. For example, different regulatory forms may result in different distributions of costs and benefits across individuals and firms. This is a particularly sensitive issue with policies that raise energy costs, which are known to be regressive. However, these issues are not discussed at length here.

[59] For a standard textbook treatment supporting this finding see Tietenberg (2006) or Callan and Thomas (2007).

[60] We say ''precise'' timing because the qualifier is important: The IPCC and others have noted that lower GHG stabilization targets would require steeper and earlier emission reductions, whereas stabilization targets that allow for more warming (with higher associated risks and impacts) would require less steep and later emission reductions.

[61] These approaches also raise the issue of the potential use of revenues from collecting a tax or auctioning allowances to emit GHGs at levels that do not exceed the cap. See Chapter 4 of U.S. EPA (2000), ''Guidelines for Preparing Economic Analyses,'' EPA 240–R–00–003.

possible among stationary source sectors under section 111. An economy-wide system might be legally possible under CAA section 615 (if the two-part test unique to that section were met) or if a NAAQS were established for GHGs. However, any economy-wide program under either provision would not stand alone; it would be accompanied by source-specific or sector-based requirements as a result of other CAA provisions (e.g., PSD permitting under section 165).

The CAA does not include a broad grant of authority for EPA to impose taxes, fees or other monetary charges specifically for GHGs and, therefore, additional legislative authority may be required if EPA were to administer such charges (which we will refer to collectively as fees). EPA may promulgate regulations that impose fees only if the specific statutory provision at issue authorizes such fees, whether directly or through a grant of regulatory authority that is written broadly enough to encompass them. For example, CAA section 110(a)(2)(A) allows for the use of ''economic incentives such as fees, marketable permits, and auctioning allowances.'' Under this provision, some states intend to auction allowances under CAIR (70 FR 25162 (May 12, 2005)) and some have under the NO_X SIP Call Rule (63 FR 57356 (Oct. 27, 1998)). By the same token, states have authority to impose emissions fees as economic incentives as part of their SIPs and collect the revenues. Similarly, section 110(a)(2)(A) authorizes EPA to impose fees as economic incentives as part of a Federal Implementation Plan (FIP) under section 110(c), although EPA has never done so.[62]

Section 111 authorizes EPA to promulgate ''standards of performance,'' which are defined as ''standard[s] for emissions of air pollutants.'' EPA has taken the position that this term authorizes a cap-and-trade program under certain circumstances. A fee program differs from a cap and trade because it does not establish an overall emission limitation, and we have not taken a position on whether, given this limitation, a fee program fits the definition of a ''standard of performance.'' Even so, under section 111 costs may be considered when establishing NSPS regulations, and a fee may balance the consideration of assuring emissions are reduced but not at an unacceptably high cost. Also, there may be advantages of including an emission fee feature into a cap-and-trade program (i.e., as a price ceiling). The use of a price ceiling that is not expected to be triggered except in the case of unexpectedly high (or low) control costs may be viewed differently under the auspices of the CAA than a stand-alone emissions fee.

We request comment on what CAA provisions, if any, would authorize emissions fees to control GHG emissions, and whether there are other approaches that could be taken under the CAA that would approximate a fee. Furthermore, we request comments on the use of emission fee programs under other sections of the Act. We also seek comment on whether sector-specific programs, or inter-sector programs where emission fees on a CO_2 equivalent basis are harmonized, might be more appropriate as possible regulatory mechanisms under the Act.

4. Economy-Wide and Sector-Based Regulation in a Clean Air Act Context

Several legislative cap-and-trade proposals for reducing GHG emissions are designed to be nearly economy wide, meaning that they attempt to reduce GHG emissions in most economic sectors through a single regulatory system. By contrast, many CAA authorities are designed for regulations that apply to a sector, subsector or source category, although broader trading opportunities exist under some authorities. This section discusses the relative merits of economy-wide systems and sector-based market-oriented approaches. These considerations may also be relevant in considering the use of CAA provisions in tandem with any climate change legislation.

i. Economy-Wide Approach

Economic theory suggests that establishing a single price for GHG emissions across all emitters through an economy-wide, multiple GHG, market-oriented policy would promote optimal economic efficiency in pursuing GHG reductions. According to the economics literature, economy-wide GHG trading or GHG emissions taxes could offer significantly greater cost savings than a sector-by-sector approach for GHGs because the broader the universe of sources covered by a single market-oriented approach (within a sector, across sectors, and across regions), the greater the potential for finding lower-cost ways to achieve the emissions target. If sources of pollution are compartmentalized into different sector-specific or pollutant-specific approaches, including the relatively flexible cap-and-trade approaches, each class of polluter may still face a different price for their contribution to the environmental harm, and therefore some trading opportunities that reduce pollution control costs will be unrealized (Burtraw and Evans, 2008).[63] Taking a sector-by-sector approach to controlling GHG emissions is likely to result in higher costs to the economy. For example, limiting a market-oriented GHG policy to the electricity and transportation sectors could double the welfare cost of achieving a five percent reduction in carbon emissions compared to when the industrial sector is also included.[64]

A second factor that favors making the scope of a market-oriented system as broad as possible is that the incentive for development, deployment and diffusion of new technologies would be spread across the economy. In contrast to an approach targeting a few key sectors, an economy-wide approach would affect a greater number of diverse GHG-emitting activities, and would influence a larger number of individual economic decisions, potentially leading to innovation in parts of the economy not addressed by a sector-by-sector approach.

As stated at the outset of this section, there are, first and most important, CAA authority issues as well as other policy and practical considerations in addition to economic efficiency that must be weighed in evaluating potential CAA approaches to GHG regulation. An economy-wide, market-oriented environmental regulation has never been implemented before in the U.S. The European Union, after encountering difficulties in early years of implementation, recently adopted major revisions to its broad multi-sector cap-and-trade system; this illustrates that some time and adjustments may be needed for such a program to achieve its intended effect. Although EPA has successfully designed and implemented market-oriented systems of narrower scope, a single economy-side system would involve new design and implementation challenges, should the CAA make possible such a system. For example —

- Administrative costs may be a concern, because more sources and sectors would have to be subject to

[62] Any such revenues from a FIP would be deposited in the Federal Treasury under the Miscellaneous Receipts Act, and not retained and disbursed by EPA.

[63] With traditional pollutants there are geographic issues to consider.

[64] William Pizer, Dallas Burtraw, Winston Harrington, Richard Newell, and James Sanchirico (2006), ''Modeling Economywide versus Sectoral Climate Policies Using Combined Aggregate-Sectoral Models,'' The Energy Journal, Vol. 27, No. 3: 135–168.

reporting and measurement, monitoring, and verification requirements.

- Some sources and sectors are more amenable to market-oriented approaches than others. The feasibility and cost of accurate monitoring and compliance assurance needed for trading programs (whether economy-wide or sector-based) varies among sectors and source size. As a result, there are potential tradeoffs between trading program scope and level of assurance that required emissions reductions will be achieved.
- To broaden the scope of cap-and-trade systems, covered sources could be allowed to purchase GHG emission reductions ''offsets'' from non-covered sources. However, offsets raise additional accountability issues, including how to balance cost efficiency against certainty of emissions reductions, how to quantify resulting emissions reductions, and how to ensure that the activities generating the offsets are conducted and maintained over time.
- Allocating allowances or auction revenues for an economy-wide GHG trading system would be very challenging for an executive branch agency because of high monetary stakes and divergent stakeholder views on how to distribute the allowances or revenues to promote various objectives. For example, many economists believe that auctioning allowances under a cap-and-trade system and using the proceeds to reduce taxes that distort economic incentives would be economically efficient, but regulated entities typically favor free allowance allocations to offset their compliance costs.[65] [66]

ii. Sector-Based and Multi-Sector Trading Under the Clean Air Act

As mentioned above, EPA has implemented multi-sector, sector and subsector-based cap-and-trade approaches in a number of CAA programs, including the Acid Rain (SO_2) Program, the NO_X SIP Call Rule, the Clean Air Interstate Rule (CAIR), and the stratospheric ozone-depleting substances (ODS) phase-out rule. In the case of the acid rain and ODS rules, the CAA itself called for federal controls. By contrast, the NO_X SIP Call rule and CAIR were established by EPA through regulations under CAA section 110(a)(2)(d) to help states attain various NAAQS. The two rules and EPA's accompanying model rules enable states to adopt compatible cap-and-trade programs that form regional interstate trading programs. The power sector and a few major industrial source categories are included in the trading system for the NO_X SIP Call, and the trading system for CAIR focuses on the electricity generation sector.

In addition to creating cap-and-trade systems, EPA has often incorporated market-oriented emissions trading elements into the more traditional performance standard approach for mobile and stationary sources. Coupling market-oriented provisions with performance standards provides some of the cost advantages and market flexibility of market-oriented solutions while also directly incentivizing technology innovation within the particular sector, as discussed below. For example, performance standards for mobile sources under Title II have for many years been coupled with averaging, banking and trading provisions within a subsector. In general, averaging allows covered parties to meet their emissions obligation on a fleet- or unit-wide basis rather than requiring each vehicle or unit to directly comply. Banking provides direct incentives for additional reductions by giving credit for over-compliance; these credits can be used toward future compliance obligations and, as such, allow manufacturers to put technology improvements in place when they are ready for market, rather than being forced to adhere to a strict regulatory schedule that may or may not conform to industry or company developments. Allowing trading of excess emission reductions with other covered parties provides an incentive for reducing emissions beyond what is required.

Based on our experience with these programs, EPA believes that sector and multi-sector trading programs for GHGs—relative to non-market regulatory approaches—could offer substantial compliance flexibility, cost savings and incentives for innovation to regulated entities. In addition, as discussed below, in some sectors there may be a need to more directly incentivize technology development because of market barriers that a sector-specific program might help to overcome. To the extent sector-based approaches could provide for control of multiple pollutants (e.g., traditional pollutants and GHGs), they could provide additional cost savings relative to multiple single-pollutant, sector-based regulations. Another consideration is that it may be simpler and thus faster to move forward with cap-and-trade programs for sectors already involved in, and thus familiar with, cap-and-trade programs. This raises the question of whether it would make sense to phase in an economy-wide system over time.

Sector and multi-sector approaches would not offer the relative economic efficiency of the economy-wide model for the reasons explained above. To the extent the program sets more stringent requirements for new sources than for existing source, a sector or multi-sector approach could also pose the vintage issues discussed below. It is also important to keep in mind that the economic efficiency of any CAA cap-and-trade approach for GHGs, sector- or economy-wide, could be reduced to a significant extent by the application of other GHG control requirements (e.g., PSD permitting) to the sources covered by the cap-and-trade program, if the result were to restrict compliance options.

iii. Combining Economy-Wide and Sector-Based Approaches

It is worth noting that market-oriented approaches may not incentivize the most cost-effective reductions when information problems, infrastructure issues, technological issues or other factors pose barriers that impeded the market response to price incentives. In such instances, there may be economic arguments for combining an economy-wide approach with complementary sector-based requirements unless these problems can be directly addressed, for instance by providing the information needed or directly subsidizing the creation of needed infrastructure.

For instance, given the relative inelasticity of demand for transportation, even a relative high permit price for carbon may not substantially change consumer vehicle purchases or travel demand, although recent reports indicate that the current price of gasoline and diesel are inducing an increasing number of consumers to choose more fuel efficient vehicles and drive less. Some have expressed concern that this relatively inelastic demand may be related to undervaluation by consumers of fuel economy when making vehicle purchasing decisions. If consumers adequately value fuel economy, fuel saving technologies will come online as a result of market forces. However, if

[65] Many economists also suggest that an emissions tax with proceeds used to decrease distortionary taxes would be economically efficient; however, the CAA does not authorize such a program.

[66] Bovenberg and Goulder (2001) find that freely allocating 20% of allowances to fossil fuel suppliers is enough to keep profits from falling. When all allowances are freely allocated, profits are found to be higher than in the absence of the carbon cap-and-trade policy. Free allocation of allowances or an approach that exempts particular sectors also raises the specter of ''rent-seeking,'' the notion that sectors or particular source categories will lobby to gain preferential treatment and, in essence, be subject to less regulatory oversight than other sectors or competitors.

consumers undervalue fuel economy, vehicle or engine manufacturers may need a more direct incentive for making improvements or the technology innovation potential may well be delayed or not fully realized. Beyond this consumer valuation issue, questions have been raised as to whether a carbon price alone (especially if the impact is initially to raise gasoline prices by pennies a gallon) will provide adequate incentives for vehicle manufacturers to invest now in breakthrough technologies with the capability to achieve significantly deeper emissions reductions in the future, and for fuel providers to make substantial investments in a new or enhanced delivery infrastructure for large-scale deployment of lower carbon fuels.[67]

EPA requests comment on how to balance the different policy and economic considerations involved in selecting potential regulatory approaches under the CAA, and on how the potential enactment of legislation should affect EPA's deliberations on how to use CAA authorities.

5. Other Selected Policy Design Issues

Another policy and legal issue in regulatory design is whether requirements should differentiate between new and existing sources. Because it is generally more costly to retrofit pollution control equipment than to incorporate it into the construction or manufacture of a new source, environmental regulations, including under the CAA, frequently apply stricter standards to new or refurbished sources than to ''grandfathered'' sources that pre-date the regulation. New sources achieve high-percentage reductions and over time existing high-emitting sources are replaced with much cleaner ones. For example, emissions from the U.S. auto fleet have been dramatically reduced over time through new vehicle standards. However, some suggest that stricter pollution control requirements for new or refurbished sources may retard replacement of older sources, discouraging technology investment, innovation and diffusion while encouraging older and less efficient sources to remain in operation longer, thereby reducing the environmental effectiveness and cost-effectiveness of the regulation. Others believe that economic factors other than differences in new and existing source requirements (e.g., capital outlay, power prices and fuel costs) have the most impact on rate of return, and that differences in regulatory stringency generally do not drive business decisions on when to build new capacity.

A 2002 EPA report on new source review requirements found that NSR ''appears to have little incremental impact on construction of new electricity generation,'' but also found that ''there were credible examples of cases in which uncertainty over the [NSR] exemption for routine activities has resulted in delay or cancellation of projects [at existing plants]'' that would have increased energy capacity, improved energy efficiency and reduced air pollution.[68] To the extent that a gap in new and existing source requirements affects business decisions, regulating existing as well as new sources can diminish or eliminate that gap. In the power sector, the gap has narrowed over time, in part as a result of CAA national and regional cap-and-trade systems that do not discriminate between new and existing facilities (i.e., both new and old power plants must hold allowances to cover their NO_X and SO_2 emissions). Another consideration is that equity issues can arise when applying retroactive requirements to existing sources. For GHGs, EPA requests comment on the concept of a market-oriented approach that does not differentiate between new and existing source controls and, by avoiding different marginal costs of control at new and existing sources, would promote more cost-effective emissions reductions. In addition, EPA requests comment on whether GHG regulations should differentiate between new and existing sources for various sectors, and whether there are circumstances in which requirements for stringent controls on new sources would have policy benefits despite the existence of a cap-and-trade system that also would apply to those sources.

Another possible design consideration for a GHG program is whether and how lifecycle approaches to controlling GHG emissions could or should be used. Lifecycle (LC) analysis and requirements have been proposed for determining and regulating the entire stream of direct and indirect emissions attributable to a regulated source. Indirect emissions are emissions from the production, transportation, and processing of the inputs that go into producing that good. Section VI.D describes possible CAA approaches for reducing GHG emissions from transportation fuels through lifecycle analysis and includes a brief discussion of a potential lifecycle approach to reducing fuel-related GHG emissions. In that context, displacing petroleum-based fuels with renewable or alternative fuels can reduce fuel-related GHGs to the extent the renewable or alternative fuels are produced in ways that result in lower GHG emissions than the production of an equivalent amount of fossil-based fuels. Tailpipe GHG emissions typically do not vary significantly across conventional and alternative or renewable fuels.

EPA recognizes that other programs, such as stationary source or area source programs described in this notice, could potentially address at least some of the indirect GHG emissions from producing fuels. We note that the technology and fuel changes that may result from an economy-wide cap-and-trade approach would likely be different from the technology and fuel changes that may result from a lifecycle approach.

EPA asks for comment on how a lifecycle approach for fuels could be integrated with other stationary source approaches and whether there are potentially overlapping incentives or disincentives. EPA also asks for comments on whether a lifecycle approach to reducing GHG emissions may be appropriate for other sectors and types of sources, and what the implications for regulating other sectors would be if a lifecycle approach is taken for fuels.

6. ''Emissions Leakage'' and International Competitiveness

A frequently raised concern with domestic GHG regulation unaccompanied by comparable policies abroad is that it might result in emissions leakage or adversely affect the international competitiveness of certain U.S. industries. The concern is that if domestic firms faced significantly higher costs due to regulation, and foreign firms remained unregulated, this could result in price changes that shift emissions, and possibly some production capacity, from the U.S. to other countries. Emissions leakage also could occur without being caused by a competitiveness issue: for instance, if a U.S. GHG policy raised the domestic price of petroleum-based fuels and led to reduced U.S. demand for those fuels, the resulting world price decline could spur increased use of petroleum-based fuels abroad, leading to increased GHG emissions abroad that offset U.S. reductions.

The extent to which international competitiveness is a potential concern varies substantially by sector. This issue is mainly raised for industries with high energy use and substantial potential

[67] See Kopp and Pizer, ''Assessing U.S. Climate Policy Options,'' Chapter 12, RFF Press: Washington, DC (2007).

[68] ''New Source Review: Report to the President, June 2002,'' U.S. EPA, pp. 30–31.

foreign competition. Even for vulnerable sectors, the concern would depend on the actual extent which a program would raise costs for an energy intensive firm facing international competition, and on whether policies to address the competitiveness issue were adopted (either as part of the rule or in another venue).

Leakage also could occur within the U.S. if emissions in one sector or region are controlled, but other sources are not. In this case, the market effects could lead to increased activity in unregulated sectors or regions, offsetting some of the policy's emissions reductions. In turn, this would raise the cost of achieving the environmental objective. The more uniform the price signal for an additional unit reduction in GHG emissions across sectors, states, and countries, the less potential there is for leakage to occur.

A recent report has identified and evaluated five conceptual options for addressing competitiveness concerns in a legislative context; some options might also be available in a regulatory context.[69] The first option, weaker program targets, would affect the entire climate protection policy. Four other options also could somewhat decrease environmental stringency but would allow for the targeting of industries or sectors particularly vulnerable to adverse economic impacts:

- Exemptions
- Non-market regulations to avoid direct energy price increases on an energy-intensive industry
- Distribution of free allowances to compensate adversely affected industries in a cap-and-trade system
- Trade-related policies such as import tariffs on carbon or energy content, export subsidies, or requirements for importers to submit allowances to cover the carbon content of certain products.

Significantly, the report noted that identifying the industries most likely to be adversely affected by domestic GHG regulation, and estimating the degree of impact, is complex in terms of data and analytical tools needed.

We request comment on the extent to which CAA authorities described in this notice could be used to minimize competitiveness concerns and leakage of emissions to other sectors or countries, and which approaches should be preferred.

G. Analytical Challenges for Economic Analysis of Potential Regulation

In the event that EPA pursues GHG emission reduction policies under the CAA or as a result of legislative action, we are required by Executive Order 12866 to analyze and take into account to the extent permitted by law the costs and benefits of the various policy options considered. Economic evaluation of GHG mitigation is particularly challenging due to the temporal and spatial dimensions of the problem discussed previously: GHG emissions have extremely long-run and global climate implications. Furthermore, changes to the domestic economy are likely to affect the global economy. In this section, we discuss a few overarching analytical challenges that follow from these points. Many of the issues discussed are also relevant when valuing changes in GHGs associated with non-climate policies.

1. Time Horizon and International Considerations in General

As discussed earlier in this section, changes in GHG emissions today will affect environmental, ecological, and economic conditions for decades to centuries into the future. In addition, changes in U.S. GHG emissions that result from U.S. domestic policy will affect climate change everywhere in the world, as will changes in the GHG emissions of other countries. U.S. domestic policy could trigger emissions changes across the U.S. economy and across regions globally, as production and competitiveness change among economic activities. Similarly, differences in the potential impacts of climate change across the world can also affect competitiveness and production. Capturing these effects requires long-run, global analysis in addition to traditional domestic and sub-national analyses.

2. Analysis of Benefits and Costs Over a Long Time Period

Since changes in emissions today will affect future generations in the U.S. and internationally, costs and benefits of GHG mitigation options need to be estimated over multiple generations. Typically, federal agencies discount future costs or benefits back to the present using a discount rate, where the discount rate represents how society trades-off current consumption for future consumption. With the benefits of GHG emissions reductions distributed over a very long time horizon, benefit and cost estimations are likely to be very sensitive to the discount rate. For policies that affect a single generation of people, the analytic approach used by EPA is to use discount rates of three and seven percent at a minimum.[70] According to the Office of Management and Budget (OMB), a three percent rate is consistent with what a typical consumer might expect in the way of a risk free market return (e.g., government bonds). A seven percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy. A key challenge facing EPA is the appropriate discount rate over the longer timeframe relevant for GHGs.

There are reasons to consider even lower discount rates in discounting the costs of benefits of policy that affect climate change. First, changes in GHG emissions—both increases and reductions—are essentially long-run investments in changes in climate and the potential impacts from climate change. When considering climate change investments, they should be compared to similar alternative investments (via the discount rate). Investments in climate change are investments in infrastructure and technologies associated with mitigation; however, they yield returns in terms of avoided impacts over a period of one hundred years and longer. Furthermore, there is a potential for significant impacts from climate change, where the exact timing and magnitude of these impacts are unknown. These factors imply a highly uncertain investment environment that spans multiple generations.

When there are important benefits or costs that affect multiple generations of the population, EPA and OMB allow for low but positive discount rates (e.g., 0.5–3% noted by U.S. EPA, 1–3% by OMB).[71] In this multi-generation context, the three percent discount rate is consistent with observed interest rates from long-term investments available to current generations (net of risk premiums) as well as current estimates of the impacts of climate change that reflect potential impacts on consumers. In addition, rates of three percent or lower are consistent with long-run uncertainty in economic growth and interest rates, considerations of issues associated with the transfer of wealth between generations, and the risk of

[69] Morgenstern, Richard D., ''Issue Brief 8: Addressing Competitiveness Concerns in the Context of a Mandatory Policy for Reducing U.S. Greenhouse Gas Emissions,'' in *Assessing U.S. Climate Policy Options: A report summarizing work at RFF [Resources for the Future] as part of the inter-industry U.S. Climate Policy Forum*, November 2007, Raymond J. Kopp and William A. Pizer, eds.

[70] EPA (U.S. Environmental Protection Agency), 2000. Guidelines for Preparing Economic Analyses. EPA 240–R–00–003. See also OMB (U.S. Office of Management and Budget), 2003. Circular A–4. September 17, 2003.

[71] OMB (2003). EPA (2000). These documents are the guidance used when preparing economic analyses for all EPA rulemakings.

high impact climate damages. Given the uncertain environment, analysis could also consider evaluating uncertainty in the discount rate (e.g., Newell and Pizer, 2001, 2003).[72] EPA solicits comment on the considerations raised and discounting alternatives for handling both benefits and costs for this long term, inter-generational context.

3. Uncertainty in Benefits and Costs

The long time horizon over which benefits and costs of climate change policy would accrue and the global relationships they involve raise additional challenges for estimation. The exact benefits and costs of virtually every environmental regulation is at least somewhat uncertain, because estimating benefits and costs involves projections of future economic activity and the future effects and costs of reducing the environmental harm. In almost every case, some of the future effects and costs are not entirely known or able to be quantified or monetized. In the case of climate change, the uncertainly inherent in most economic analyses of environmental regulations is magnified by the long-term and global scale of the problem and the resulting uncertainties regarding socio-economic futures, corresponding GHG emissions, climate responses to emissions changes, the bio-physical and economic impacts associated with changes in climate, and the costs of reducing GHG emissions. For example, uncertainties about the amount of temperature rise for a given amount of GHG emissions and rates of economic and population growth over the next 50 or 100 years will result in a large range of estimates of potential benefits and costs. Lack of information with regard to some important benefit categories and the potential for large impacts as a result of climate exceeding known but uncertain thresholds compound this uncertainty. Likewise, there are uncertainties regarding the pace and form of future technological innovation and economic growth that affect estimates of both costs and benefits. These difficulties in predicting the future can be addressed to some extent by evaluating alternative scenarios. In uncertain situations such as that associated with climate, EPA typically recommends that analysis consider a range of benefit and cost estimates, and the potential implications of non-monetized and non-quantified benefits.

Given the substantial uncertainties in quantifying many aspects of climate change mitigation and impacts, it is difficult to apply economic efficiency criteria, or even positive net benefit criteria.[73] Identifying an efficient policy requires knowing the marginal benefit and marginal cost curves for GHG emissions reductions. If the marginal benefits are greater than the marginal costs, then additional emissions reductions are merited (i.e., they are efficient and provide a net benefit). However, the curves are not precise lines; instead they are wide and partially unknown bands. Similarly, estimates of total benefits and costs can be expressed only as ranges. As a result, it is difficult to both identify the efficient policy and assess net benefits.

In situations with large uncertainties, the economic literature suggests a risk management framework as being appropriate for guiding policy (Manne and Richels, 1992; IPCC WGIII, 2007).[74] In this framework, the policymaker selects a target level of risk and seeks the lowest cost approach for reaching that goal. In addition, the decision-making process is an iterative one of acting, learning, and acting again (as opposed to there being a single decision point). In this context, the explicit or implicit value of changes in risk is important. Furthermore, some have expressed concern in the economics literature that standard deterministic approaches (i.e., approaches that imply there is only one known and single realization of the world) do not appropriately characterize the uncertainty and risk related to climate change and may lead to a substantial underestimation of the benefits from taking action (Weitzman, 2007a, 2007b).[75] Formal uncertainty analysis may be one approach for at least partially addressing this concern. EPA solicits comment on how to handle uncertainty in benefits and costs calculations and application, given the quantified and unquantified uncertainties.

4. Benefits Estimation Specific Issues—Scope, Estimates, State-of-the-art

Another important issue in economic analysis of climate change policies is valuing domestic and international benefits. U.S. GHG reductions are likely to yield both domestic and global benefits. Typically, because the benefits and costs of most environmental regulations are predominantly domestic, EPA focuses on benefits that accrue to the U.S. population when quantifying the impacts of domestic regulation. However, OMB's guidance for economic analysis of federal regulations specifically allows for consideration of international effects.[76]

GHGs are global pollutants. Economic principles suggest that the full costs to society of emissions should be considered in order to identify the policy that maximizes the net benefits to society, i.e., achieves an efficient outcome (Nordhaus, 2006).[77] Estimates of global benefits capture more of the full value to society than domestic estimates and can therefore help guide policies towards higher global net benefits for GHG reductions.[78] Furthermore, international effects of climate change may also affect domestic benefits directly and indirectly to the extent U.S. citizens value international impacts (e.g., for tourism reasons, concerns for the existence of ecosystems, and/or concern for others); U.S. international interests are affected (e.g., risks to U.S. national security, or the U.S. economy from potential disruptions in other nations); and/or domestic mitigation decisions affect the level of mitigation and emissions changes in general in other countries (i.e, the benefits realized in the U.S. will depend on emissions changes in the U.S. and internationally). The economics literature also suggests that policies based on direct domestic benefits will result in little appreciable

[72] Newell, R. and W. Pizer, 2001. Discounting the benefits of climate change mitigation: How much do uncertain rates increase valuations? PEW Center on Global Climate Change, Washington, DC. Newell, R. and W. Pizer, 2003. Discounting the distant future: how much do uncertain rates increase valuations? Journal of Environmental Economics and Management 46: 52–71.

[73] IPCC WGI. (2007). Climate Change 2007—The Physical Science Basis Contribution of Working Group I to the Fourth Assessment Report of the IPCC, *http://www.ipcc.ch/*. IPCC WGII. (2007). Climate Change 2007—Impacts, Adaptation and Vulnerability Contribution of Working Group II to the Fourth Assessment Report of the IPCC, *http://www.ipcc.ch/*. IPCC WGIII (2007). Climate Change 2007—Mitigation Contribution of Working Group III to the Fourth Assessment Report of the IPCC, *http://www.ipcc.ch/*. U.S. Congressional Budget Office (2005). Uncertainty in Analyzing Climate Change: Policy Implications. The Congress of the United States, January 2005.

[74] Manne, A. and R. Richels (1992). ''Buying Greenhouse Insurance—the Economic Costs of Carbon Dioxide Emission Limits'', MIT Press book, Cambridge, MA, 1992. IPCC WGIII (2007).

[75] Weitzman, M., 2007a, ''The Stern Review of the Economics of Climate Change,'' *Journal of Economic Literature*. Weitzman, M., 2007b, ''Structural Uncertainty and the Statistical Life in the Economics of Catastrophic Climate Change,'' Working paper *http://econweb.fas.harvard.edu/faculty/weitzman/papers/ValStatLifeClimate.pdf*.

[76] OMB (2003), page 15.

[77] Nordhaus, W., 2006, ''Paul Samuelson and Global Public Goods,'' in M. Szenberg, L. Ramrattan, and A. Gottesman (eds), *Samuelsonian Economics*, Oxford.

[78] Both the United Kingdom and the European Commission following these economic principles in consideration of the global social cost of carbon (SCC) for valuing the benefits of GHG emission reductions in regulatory impact assessments and cost-benefit analyses (Watkiss et al, 2006).

reduction in global GHGs (e.g., Nordhaus, 1995).[79]

These economic principles suggest that global benefits should also be considered when evaluating alternative GHG reduction policies.[80] In the literature, there are a variety of global marginal benefits estimates (see the Tol, 2005, and Tol, 2007, meta analyses).[81] A marginal benefit is the estimated monetary benefit for each additional unit of carbon dioxide emissions reduced in a particular year.[82]

Based on the characteristics of GHGs and the economic principles that follow, EPA developed ranges of global and U.S. marginal benefits estimates. The estimates were developed as part of the work evaluating potential GHG emission reductions from motor vehicles and their fuels under Executive Order 13432. However, it is important to note at the outset that the estimates are incomplete since current methods are only able to reflect a partial accounting of the climate change impacts identified by the IPCC (discussed more below). Also, as noted above, domestic estimates omit potential impacts on the United States (e.g., economic or national security impacts) resulting from climate change impacts in other countries. The global estimates were developed from a survey analysis of the peer reviewed literature (i.e. meta analysis). U.S. estimates, and a consistent set of global estimates, were developed from a single model and are highly preliminary, under evaluation, and likely to be revised.

The range of estimates is wide due to the uncertainties described above relating to socio-economic futures, climate responsiveness, impacts modeling, as well as the choice of discount rate. For instance, for 2007 emission reductions and a 2% discount rate the global meta analysis estimates range from $–3 to $159/t$CO_2$, while the U.S. estimates range from $0 to $16/t$CO_2$. For 2007 emission reductions and a 3% discount rate, the global meta-estimates range from $–4 to $106/t$CO_2$, and the U.S. estimates range from $0 to $5/t$CO_2$.[83] The global meta analysis mean values for 2007 emission reductions are $68 and $40/t$CO_2$ for discount rates of 2% and 3% respectively (in 2006 real dollars) while the domestic mean value from a single model are $4 and $1/t$CO_2$ for the same discount rates. The estimates for future year emission changes will be higher as future marginal emissions increases are expected to produce larger incremental damages as physical and economic systems become more stressed as the magnitude of climate change increases.[84]

The current state-of-the-art for estimating benefits is also important to consider when evaluating policies. There are significant partially unquantified and omitted impact categories not captured in the estimates provided above. The IPCC WGII (2007) concluded that current estimates are ''very likely'' to be underestimated because they do not include significant impacts that have yet to be monetized.[85] Current estimates do not capture many of the main reasons for concern about climate change, including non-market damages (*e.g.*, species existence value and the value of having the option for future use), the effects of climate variability, risks of potential extreme weather (*e.g.*, droughts, heavy rains and wind), socially contingent effects (such as violent conflict or humanitarian crisis), and potential long-term catastrophic events. Underestimation is even more likely when one considers that the current trajectory for GHG emissions is higher than typically modeled, which when combined with current regional population and income trajectories that are more asymmetric than typically modeled, imply greater climate change and vulnerability to climate change.

Finally, with projected increasing changes in climate, some types of potential climate change impacts may occur suddenly or begin to increase at a much faster rate, rather than increasing gradually or smoothly. In this case, there are likely to be jumps in the functioning of species and ecosystems, the frequency and intensity of extreme conditions (*e.g.*, heavy rains, forest fires), and the occurrence of catastrophic events (*e.g.*, collapse of the West Antarctic Ice Sheet). As a result, different approaches are necessary for quantifying the benefits of ''small'' (incremental) versus ''large'' (non-incremental) reductions in global GHGs. Marginal benefits estimates, like those presented above, can be useful for estimating benefits for small changes in emissions. However, for large changes in emissions, a more comprehensive assessment of impacts would be needed to capture changes in economic and biophysical dynamics and feedbacks in response to the policy. Even small reductions in global GHG emissions are expected to reduce climate change risks, including catastrophic risks.

EPA solicits comment on the appropriateness of using U.S. and global values in quantifying the benefits of GHG reductions and the appropriate application of benefits estimates given the state of the art and overall uncertainties. We also seek comment on our estimates of the global and U.S. marginal benefits of GHG emissions reductions that EPA has developed, including the scientific and economic foundations, the methods employed in developing the estimates, the discount rates considered, current and proposed future consideration of uncertainty in the estimates, marginal benefits estimates for non-CO_2 GHG emissions reductions, and potential opportunities for improving the estimates. We are also interested in comments on methods for quantifying benefits for non-incremental reductions in global GHG emissions.

5. Energy Security

In recent actions, both EPA and NHTSA have considered other benefits of a regulatory program that, though not directly environmental, can result from compliance with the program and may

[79] Nordhaus, William D. (1995). ''Locational Competition and the Environment: Should Countries Harmonize Their Environmental Policies?'' in Locational Competition in the World Economy, Symposium 1994, ed., Horst Siebert, J. C. B. Mohr (Paul Siebeck), Tuebingen, 1995.

[80] Recently, the National Highway Traffic Safety Administration (NHTSA) proposed a new rulemaking for average fuel economy standards for passenger cars and light trucks that is based on domestic marginal benefit estimates for carbon dioxide reductions. See section V.A.7.l.(iii) ''Economic value of reductions in CO_2 emissions'' (p. 24413) of Vol. 73 of the Federal Registry. Department of Transportation, National Highway Traffic Safety Administration, 49 CFR Parts 523, 531, 533, 534, 536 and 537 [Docket No. NHTSA–2008 –0089], RIN 2127–AK29, Average Fuel Economy Standards: Passenger Cars and Light Trucks, Model Years 2011–2015, *http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&;o=09000064 80541adc*.

[81] Tol, Richard, 2005. The marginal damage costs of carbon dioxide emissions: an assessment of the uncertainties. *Energy Policy* 33: 2064–2074. Tol, Richard, 2007. The Social Cost of Carbon: Trends, Outliers and Catastrophes. *Economics Discussion Papers* Discussion Paper 2007–44, September 19, 2007. Tol (2007) has been published on-line with peer review comments (*http://www.economics-ejournal.org/economics/discussionpapers/2007–44*).

[82] This is sometimes referred to as the social cost of carbon, which specifically is defined as the net present value of the change in climate change impacts over the atmospheric life of the greenhouse gas and the resulting climate inertia associated with one additional net global metric ton of carbon emitted to the atmosphere at a particular point in time.

[83] See the Technical Support Document on Benefits of Reducing GHG Emissions for global estimates consistent with the U.S. estimates in the text and for a comparison to the Tol (2005) meta analysis peer reviewed estimates. Tol (2005) estimates were cited in NHTSA's proposed rule and by the 9th U.S. Circuit Court (Center for Biodiversity v. NHTSA, F. 3d. 9th Cir., Nov. 15, 2007).

[84] Note that, except for illustrative purposes, marginal benefits estimates in the peer reviewed literature do not use consumption discount rates as high as 7%.

[85] IPCC WGII, 2007. In the IPCC report, ''very likely'' was defined as a greater than 90% likelihood based on expert judgment.

be quantified.[86] One of these potential benefits, related to the transportation sector, is increased energy security due to reduced oil imports. It is clear that both financial and strategic risks can result within the U.S. economy if there is a sudden disruption in the supply or a spike in the costs of petroleum. Conversely, actions that promote development of lower carbon fuels that can substitute for petroleum or technologies that more efficiently combust petroleum during operation can result in reduced U.S. oil imports, and can therefore reduce these financial and strategic risks. This reduction in risks is a measure of improved energy security and represents a benefit to the U.S. As the Agency evaluates potential actions to reduce GHGs from the U.S. economy, it intends to also consider the energy security impacts associated with these actions.

6. Interactions With Other Policies

Climate change and GHG mitigation policies will likely affect most biophysical and economic systems, and will therefore affect policies related to these systems. For example, as previously mentioned, climate change will affect air quality and GHG mitigation will affect criteria pollutant emissions. These effects will need to be evaluated, both in the context of economic costs and benefits, as well as policy design in order to exploit synergies and avoid inefficiencies across policies. Non-climate policies, whether focused on traditional air pollutants, energy, transportation, or other areas, can also affect baselines and mitigation opportunities for climate policies. For instance, energy policies can change baseline GHG emissions and the development path of particular energy technologies, potentially affecting the GHG mitigation objectives of climate policies as well as changing the relative costs of mitigation technologies. EPA seeks comment on important policy interactions.

7. Integrating Economic and Noneconomic Considerations

While economics can answer questions about the cost effectiveness and efficiency of policies, judgments about the appropriate mitigation policy, potential climate change impacts, and even the discount rate can be informed by economics and science but also involve important policy, legal, and ethical questions. The ultimate choice of a global climate stabilization target may be a policy choice that incorporates both economic and non-economic factors, while the choice of specific implementation strategies may be based on effectiveness criteria. Furthermore, other quantitative analyses are generally used to support the development of regulations. Distributional analyses, environmental justice analyses, and other analyses can be informative. For example, to the extent that climate change affects the distribution of wealth or the distribution of environmental damages, then climate change mitigation policies may have significant distributional impacts, which may in some cases be more important than overall efficiency or net benefits. EPA seeks comment on how to adequately inform economic choices, as well as the broader policy choices, associated with GHG mitigation policies.

IV. Clean Air Act Authorities and Programs

In developing a response to the *Massachusetts* decision, EPA conducted a thorough review of the CAA to identify and assess all of the Act's provisions that might be applied to GHG emissions. Although the *Massachusetts* decision addresses only CAA section 202(a)(1), which authorizes new motor vehicle emission standards, the Act contains a number of provisions that could conceivably be applied to GHGs emissions. EPA's review of these provisions and their interconnections indicated that a decision to regulate GHGs under section 202(a) or another CAA provision could or would lead to regulation under other CAA provisions. This section of the notice provides an overview of the CAA and examines the various interconnections among CAA provisions that could lead to broad regulation of GHG emission sources under the Act.

A. Overview of the Clean Air Act

The CAA provides broad authority to combat air pollution. Cars, trucks, construction equipment, airplanes, and ships, as well as a broad range of electric generation, industrial, commercial and other facilities, are subject to various CAA programs. Implementation of the Act over the past four decades has resulted in significant reductions in air pollution at the same time the nation's economy has grown.

As more fully examined in Section VII of this notice, the CAA provides three main pathways for regulating stationary sources of air pollutants. They include, in order of their appearance in the Act, national ambient air quality standards (NAAQS) and state plans for implementing those standards (SIPs); performance standards for new and existing stationary sources; and hazardous air pollutant standards for stationary sources. In addition, the Prevention of Significant Deterioration (PSD) program requires preconstruction permitting and emission controls for certain new and modified major stationary sources, and the Title V program requires operating permits for all major stationary sources.

Section 108 of the CAA authorizes EPA to list air pollutants that are emitted by many sources and that cause or contribute to air pollution problems such as ozone (smog) and particulate matter (soot). For every pollutant listed, EPA is required by section 109 to set NAAQS that are ''requisite'' to protect public health and welfare. EPA may not consider the costs of meeting the NAAQS in setting the standards. Under section 110, every state develops and implements plans for meeting the NAAQS by applying enforceable emission control measures to sources within the state. The Act's requirements for SIPs are more detailed and stringent for areas not meeting the standards (nonattainment areas) than for areas meeting the standards (attainment areas). Costs may be considered in implementing the standards. States are aided in their efforts to meet the NAAQS by federal emissions standards for mobile sources and major categories of stationary sources issued under other sections of the Act.

Under CAA section 111, EPA establishes emissions performance standards for new stationary sources and modifications of existing sources for categories of sources that contribute significantly to harmful air pollution. These new source performance standards (NSPS) reduce emissions of air pollutants addressed by NAAQS, but can be issued regardless of whether there is a NAAQS for the pollutants being regulated. NSPS requirements for new sources help ensure that when large sources of air pollutants are built or modified, they apply available emission control technologies and strategies.

When EPA establishes a NSPS for a pollutant, section 111(d) calls upon states to issue a standard for existing sources in the regulated source category except in two circumstances. First, section 111(d) prohibits regulation of a NAAQS pollutant. Second, ''where a source category is being regulated under section 112, a section 111(d) standard of performance cannot be established to

[86] The EPA has worked with Oak Ridge National Laboratory to develop a methodology that quantifies energy security benefits associated with the reduction of imported oil. This methodology was used to support the EPA's 2007 Renewable Fuels Standards Rulemaking and NHTSA's 2008 proposed Average Fuel Economy Standards for Passenger Cars and Light Trucks Rulemaking for Model Years 2001—2015.

address any HAP listed under section 112(b) that may be emitted from that particular source category.''[87] In effect, existing source NSPS provides a ''regulatory safety net'' for pollutants not otherwise subject to major regulatory programs under the CAA. Section 111 provides EPA and states with significant discretion concerning the sources to be regulated and the stringency of the standards, and allows consideration of costs in setting NSPS.

CAA section 112 provides EPA with authority to list and issue national emissions standards for hazardous air pollutants (HAPs) from stationary sources. HAPs are broadly defined as pollutants that present, or may present, a threat of adverse human or environmental effects. HAPs include substances which are, or may reasonably be anticipated to be, carcinogenic, mutagenic, neurotoxic or acutely or chronically toxic. Section 112 contains low emissions thresholds for regulation in view of its focus on toxic pollutants, and requires regulation of all major sources of HAPs. Section 112 also provides for ''maximum achievable control technology'' (MACT) standards for major sources, limiting consideration of cost.

The PSD program under Part C of Title I of the Act is triggered by regulation of a pollutant under any other section of the Act except for sections 112 and 211(o). As mentioned previously in this notice, under this program, new major stationary sources and modifications at existing major stationary sources undergo a preconstruction permitting process and install best available control technology (BACT) for each regulated pollutant. These basic requirements apply regardless of whether a NAAQS exists for the pollutant; additional PSD requirements apply in the event of a NAAQS. The PSD program's control requirements help prevent large new and modified sources of air pollutants from significantly degrading the air quality in clean air areas. A similar program, called ''new source review,'' ensures that new or modified large sources in areas not meeting the NAAQS do not make it more difficult for the areas to eventually attain the air quality standards.

Title II of the CAA provides comprehensive authority for regulating mobile sources of air pollutants. As more fully described in Section VI of this notice, Title II authorizes EPA to address all categories of mobile sources and take an integrated approach to regulation by considering the unique aspects of each category, including passenger vehicles, trucks and nonroad vehicles, as well as the fuels that power them. Title II requires EPA to consider technological feasibility, costs, safety and other factors in setting standards, and gives EPA discretion to set technology-forcing standards as appropriate. In addition, section 211(o) of the Act establishes the renewable fuel standard (RFS) program, which was recently strengthened by EISA to require substantial increases in the use of renewable fuels, including renewable fuels with significantly lower lifecycle GHG emissions than the fossil fuel-based fuels they replace.[88] The CAA's mobile source authorities work in tandem with the Act's stationary source authorities to help protect public health and the environment from air pollution.

Title VI of the CAA authorizes EPA to take various actions to protect stratospheric ozone, a layer of ozone high in the atmosphere that helps protect the Earth from harmful UVB radiation. As discussed in Section VIII of this notice, section 615 provides broad authority to regulate any substance, practice, process or activity that may reasonably be anticipated to affect the stratosphere and that effect may reasonably be anticipated to endanger public health or welfare.

B. Interconnections Among Clean Air Act Provisions

The provisions of the CAA are interconnected in multiple ways such that a decision to regulate one source category of GHGs could or would lead to regulation of other source categories of GHGs. As described in detail below, there are several provisions in the CAA that contain similar endangerment language. An endangerment finding for GHGs under one provision of the Act could thus have ramifications under other provisions of the Act. In addition, CAA standards applicable to GHGs for one category of sources could trigger PSD requirements for other categories of sources that emit GHGs. How a term is interpreted for one part of the Act could also affect other provisions using the same term.

These CAA interconnections are by design. As described above, the Act combats air pollutants in several ways that reflect the nature and effects of the particular air pollutant being addressed. The Act's approaches are in many cases complementary and reinforcing, ensuring that air pollutants emitted by various types of emission sources are reduced in a manner and to an extent that reflects the relative contribution of particular categories of sources. The CAA's authorities are intended to work together to achieve air quality that protects public health and welfare.

For GHGs, the CAA's interconnections mean that careful attention needs to be paid to the consequences and specifics of decisions regarding endangerment and regulation of any particular category of GHG sources under the Act. In the case of traditional air pollutants, EPA and States have generally regulated pollutants incrementally over time, adding source categories or program elements as evolving circumstances make appropriate. In light of the broad variety and large number of GHG sources, any decision to regulate under the Act could lead, relatively quickly, to more comprehensive regulation of GHG sources under the Act. A key issue to consider in examining the Act's provisions and their interconnections is the extent to which EPA may choose among and/or tailor the CAA's authorities to implement a regulatory program that makes sense for GHGs, given the unique challenges and opportunities that regulating them would present.

This section of the notice explores these interconnections, and later sections explain how each CAA provision might apply to GHGs.

1. Similar Endangerment Language Is Found in Numerous Sections of the Clean Air Act

The Supreme Court's decision in *Massachusetts* v. *EPA* requires EPA to address whether GHG emissions from new motor vehicles meet the endangerment test of CAA section 202(a)(1). That section states:

> [t]he Administrator shall by regulation prescribe (and from time to time revise) * * * standards applicable to the emissions of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

CAA section 202(a)(1). If the Administrator makes a positive endangerment determination for GHG emissions from new motor vehicles, he must regulate those GHG emissions under section 202(a) of the Act.

Similar endangerment language is found in numerous sections of the CAA, including sections 108, 111, 112, 115, 211, 213, 231 and 615. For example, CAA section 108(a)(1) (regarding listing pollutants to be regulated by NAAQS)

[87] *See* 70 FR 15994, 16029–32 (Mar. 29, 2005).

[88] As explained further below, EISA provides that regulation of renewable fuels based on lifecycle GHG emissions does not trigger any other regulation of GHGs under the CAA.

states, ''[T]he Administrator shall * * * publish, and shall from time to time thereafter revise, a list which includes each air pollutant (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare * * *'' CAA section 111(b)(1)(A) (regarding listing source categories to be regulated by NSPS) states: ''[The Administrator] shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.''[89]

While no two endangerment tests are precisely the same, they generally call on the Administrator of EPA to exercise his or her judgment regarding whether a particular air pollutant or source category causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare. For provisions containing endangerment language, a positive finding of endangerment is a prerequisite for regulation under that provision.[90] The precise effect of a positive or negative finding depends on the specific terms of the provision under which it is made. For some provisions, a positive endangerment finding triggers an obligation to regulate (e.g., section 202(a)(1)), while for other provisions, a positive finding allows the Agency to regulate in its discretion (e.g., section 213). In some cases, other criteria must also be met to authorize or require regulation (e.g., section 108). Each of these sections is discussed in more detail later in this notice.

2. Potential Impact Cross the Clean Air Act From a Positive or Negative Endangerment Finding or Regulation of GHGs Under the Act

a. Potential Impact on Sections Containing Similar Endangerment Language

One important issue is whether a positive or negative endangerment finding under one section of the CAA (e.g., under section 202(a) in response to the ICTA petition remand) would necessarily or automatically lead to similar findings under other provisions of the Act containing similar language. Even though CAA endangerment tests vary to some extent, an endangerment finding under one provision could have some bearing on whether endangerment could or should be found under other CAA provisions, depending on their terms and the facts at issue. EPA request comment on the extent to which an endangerment finding under any section of the CAA would lead EPA to make a similar endangerment finding under another provision.

In discussing the implications of making a positive endangerment finding under any CAA section, we use the actual elements of the endangerment test in section 202(a) for new motor vehicles as an example. The section 202(a) endangerment test asks two distinct questions—

(1) whether the air pollution at issue may reasonably be anticipated to endanger public health or welfare, and

(2) whether emissions from new motor vehicles cause or contribute to that air pollution. The first question is generic and looks at whether the type of air pollution at issue endangers public health or welfare. The second question is specific to motor vehicles, and considers the contribution of motor vehicle emissions to the particular air pollution problem. EPA must answer both questions in the affirmative for the Agency to regulate under section 202(a) of the Act.

A finding of endangerment under one section of the Act would not by itself constitute a complete finding of endangerment under any other section of the CAA. How much of a precedent an endangerment finding under one CAA provision would be for other CAA provisions would depend on the basis for the finding, the statutory tests for making findings, and the facts. For example, the two-part endangerment test in section 202(a) (motor vehicles) is similar to that in sections 211(c)(1) (highway and nonroad fuels) and 231(a)(2) (aircraft). An affirmative finding under section 202(a) on the first part of the test—whether the air pollution at issue endangers public health or welfare—would appear to satisfy the first part of the test for the other two provisions as well. However, an affirmative finding on the second part of the test, regarding the contribution of the particular source category to that air pollution, would not satisfy the test for the other provisions, which apply to different source categories. Still, a finding that a particular source category's emissions cause or contribute to the air pollution problem would likely establish some precedent for what constitutes a sufficient contribution for purposes of making a positive endangerment finding for other source categories.

Other similarities and differences among endangerment tests are also relevant. While the first part of the test in sections 213(a)(4) (nonroad engines and vehicles) and 111(b) (NSPS) is similar to that in other sections (i.e., whether the air pollution at issue endangers public health or welfare), the second part of the test in sections 213(a)(4) and 111(b) requires a finding of ''significant'' contribution. In addition, the test under section 111(b) applies to source categories, not to a particular air pollutant.[91] Sections 112 and 615 have somewhat different tests.

The extent to which an endangerment finding would set precedent would also depend on the pollutants at issue. For example, the ICTA petition to regulate motor vehicles under section 202(a)

[89] Other CAA endangerment provisions read as follows:

CAA section 115 (regarding international air pollution) states: ''Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.''

CAA section 211(c)(1) (regarding regulating fuels and fuel additives) states: ''The Administrator may, * * * [regulate fuels or fuel additives] (A) if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger public health or welfare, (B) * * *''

CAA section 213(a)(4) (regarding regulating nonroad engines) states: ''If the Administrator determines that any emissions not referred to in paragraph 2 [regarding CO, NO_X and VOC emissions] from new nonroad engines or vehicles significantly contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, the Administrator may promulgate * * * standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives) which in the Administrator's judgment cause, or contribute to, such air pollution, * * *''.

CAA section 231 (regarding setting aircraft standards) states: ''The Administrator shall * * * issue proposed emissions standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.''

CAA section 615 (regarding protection of stratospheric ozone) states: ''If, in the Administrator's judgment, any substance, practice, process, or activity may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere, and such effect may reasonably be anticipated to endanger public health or welfare, the Administrator shall promptly promulgate regulations respecting the control of such substance, practice, process, or activity * * *''

[90] As defined by the CAA, ''air pollutant'' includes virtually any substance or material emitted into the ambient air. Given the breadth of that term, many CAA provisions require the Administrator to determine whether a particular air pollutant causes or contributes to an air pollution problem as a prerequisite to regulating emissions of that pollutant.

[91] As discussed below, EPA has already listed a very wide variety of source categories under section 111(b)(1)(A).

addresses CO_2, CH_4 , N_2O, and HFCs, while the petitions to regulate GHGs from other mobile source categories collectively address water vapor, NO_X and black carbon, as well as CO_2, CH_4, and N_2O. As further discussed below, the differences in the GHGs emitted by different types of sources may be relevant to the issue of how to define ''air pollutant'' for purposes of applying the endangerment tests.

In addition, some CAA sections require EPA to act following a positive endangerment finding, while others do not. In the case of section 202(a)(1), if we make a positive endangerment finding, we are required to issue standards applicable to motor vehicle emissions of the GHGs covered by the finding. Section 231(a) (aircraft) uses similar mandatory language, while sections 211(c)(1) (highway and nonroad fuel) and 213(a)(4) (nonroad engines and vehicles) authorize but do not require the issuance of regulations. Section 108 (NAAQS pollutants) requires that EPA list a pollutant under that section if a positive endangerment finding is made and two other criteria are met.

In sum, a positive or negative endangerment finding for GHG emissions under one provision of the Act could have a significant and direct impact on decisions under other CAA sections containing similar endangerment language. EPA requests comment on the interconnections between the CAA endangerment tests and the impact that a finding under one provision of the Act would have for other CAA provisions.

b. Potential Impact on PSD Program

Another important issue is the potential for a decision to regulate GHGs for mobile or stationary sources to automatically trigger additional permitting requirements for stationary sources under the PSD program. As explained previously and in detail in Section VII of this notice, the main element of the PSD program under Part C of Title I of the Act is the requirement that a PSD permit be obtained prior to construction of any new major source or any major modification at an existing major source. Such a permit must contain emissions limitations based on BACT for each pollutant subject to regulation under the Act. EPA does not interpret the PSD program provisions to apply to GHG at this time, but any requirement to control CO_2 or other GHGs promulgated by EPA under other provisions of the CAA would make parts of the PSD program applicable to any additional air pollutant(s) that EPA regulates in this manner.

The PSD program applies to each air pollutant (other than a HAP) that is ''subject to regulation under the Act'' within the meaning of sections 165(a)(4) and 169(3) of the Clean Air Act and EPA's regulations.[92] As a practical matter, the identification of pollutants subject to the PSD program is driven by the BACT requirement because this requirement applies to the broadest range of pollutants. Under EPA's PSD program regulations, BACT is required for ''each regulated NSR pollutant.'' 40 CFR 52.21(j)(2)–(3). EPA has defined this term to include pollutants that are regulated under a NAAQS or NSPS, a class I or II substance under Title VI of the Act, or ''[a]ny pollutant otherwise subject to regulation under the Act.'' See 52.21(b)(50).[93] Similarly, the determination of whether a source is a major source subject to PSD is based on whether the source emits more than 100 or 250 tons per year (depending on the type of source) of one or more regulated pollutants.[94]

EPA has historically interpreted the phrase ''subject to regulation under the Act'' to describe air pollutants subject to CAA statutory provisions or regulations that require actual control of emissions of that pollutant.[95] PSD permits have not been required to contain BACT emissions limit for GHGs because GHGs (and CO_2 in particular) have not been subject to any CAA provisions or EPA regulations issued under the Act that require actual control of emissions.[96] Although CAA section 211(o) now targets GHG emissions, EISA provides that neither it nor implementing regulations affect the regulatory status of GHGs under the CAA. In the absence of statutory or regulatory requirements to control GHG emissions under the Act, a stationary source need not consider those emissions when determining its major source status.

The Supreme Court's conclusion that GHGs are ''air pollutants'' under the CAA did not automatically make these pollutants subject to the PSD program. A substance may be an ''air pollutant'' under the Act without being regulated under the Act. The Supreme Court directed the EPA Administrator to determine whether GHG emissions from motor vehicles meet the endangerment test of CAA section 202(a). A positive finding of endangerment would require the Administrator to then set standards applicable to GHG emissions from motor vehicles under the Act. The positive finding itself would not constitute a regulation requiring actual control of emissions. GHGs would become regulated pollutants under the Act if and when EPA subjects GHGs to control requirements under a CAA provision other than sections 112 and 211(o).

c. Definition of ''Air Pollutant''

Another way in which a decision to regulate GHGs under one section of the Act could impact other sections of the Act involves how the term ''air pollutant'' is defined as part of the endangerment analysis. As described above, many of the Act's endangerment tests require a two-part analysis: Whether the air pollution at issue may reasonably be anticipated to endanger public health or welfare, and whether emissions of particular air pollutants cause or contribute to that air pollution.

[92] Section 112(b)(6) precludes listed HAPs from the PSD program. Section 210(b) of EISA provides that nothing in section 211(o) of the Act, or regulations issued pursuant to that subsection, ''shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 165) of this Act.''

[93] This definition reflects EPA's interpretation of the phrase ''each pollutant subject to regulation under the Act'' that is used in the provisions in the Clean Air Act that establish the BACT requirement. Since this statutory language (as implemented in the definition of ''regulated NSR pollutant'') can apply to additional pollutants that are not also subject to a NAAQS, the scope of the BACT requirement determines the overall range of pollutants that are subject to the PSD permitting program.

[94] Under the relevant regulations, a major stationary source is determined by its emissions of ''any regulated NSR pollutant.'' See 40 CFR 52.21(b)(1)(i). Thus, the emissions that are considered in identifying a major source are determined on the basis of the same definition that controls the applicability of the BACT.

[95] 43 FR 26388, 26397 (June 19, 1978); Gerald E. Emison, Director, Office of Air Quality Planning and Standards, *Implementation of North County Resource Recovery PSD Remand* (Sept. 22, 1987) (footnote on the first page).

[96] See briefs filed before the Environmental Appeal Board on behalf of specific EPA offices in challenges to the PSD permits for Deseret Power Electric Cooperative (PSD Appeal No. 07–03) and Christian County Generation LLC (PSD Appeal No. 07–01), as well as the Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct [for Deseret Power Electric Cooperative], Permit No. PSD–OU–0002–04.00 (August 30, 2007), at 5–6, available at *http://www.epa.gov/region8/air/permitting/deseret.html*. EPA has not previously interpreted the BACT requirement to apply to air pollutants that are only subject to requirements to monitor and report emissions. See, 67 FR 80186, 80240 (Dec. 31, 2002); 61FR 38250, 38310 (July 31, 1996); In Re Kawaihae Cogeneration Project 7 E.A.D. 107, 132 (EAB 1997); *Inter-power of New York*, 5 E.A.D. 130, 151 (EAB 1994); Memorandum from Jonathan Z. Cannon, General Counsel to Carol M. Browner, Administrator, entitled *EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (April 10, 1998) (emphasis added); Memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, entitled *Definition of Regulated Air Pollutant for Purposes of Title V*, at 5 (April 26, 1993).

As discussed in more detail in the following sections, what GHGs might be defined as an ''air pollutant'' and whether those GHGs are treated individually or as a group could impact EPA's flexibility to define the GHGs as air pollutants elsewhere in the CAA.

For example, as noted above, how EPA defines GHGs as air pollutants in making any positive endangerment finding could carry over into implementation of the PSD program. If EPA defines each individual GHG as a separate air pollutant in making a positive endangerment finding, then each GHG would be considered individually as a ''regulated NSR pollutant'' in the PSD program. On the other hand, if EPA defines the group of GHGs as an air pollutant, then the PSD program would need to treat the GHGs in the same manner—as a group. As discussed in more detail below, there are flexibilities and considerations under various approaches. One question is whether we could or should define GHGs as an ''air pollutant'' one way under one section of the Act (e.g., section 202) and another way under another section (e.g., section 231). *See, e.g., Environmental Defense* v. *Duke Energy Corp.,* 127 S.Ct. 1423, 1432 (2007) (explaining that the general presumption that the same term has the same meaning is not rigid and readily gives way to context). Another question is whether having different definitions of ''air pollutant'' would result in both definitions applying to the PSD program, and whether that result would mean that any flexibilities gained under one definition would be lost with the application of the second.

Another consideration, noted above, is that different source categories emit different GHGs. This fact could impact the definition of ''air pollutant'' more broadly. EPA requests comment on the issues raised in this section, to assist the Agency as it considers the implications of how to define a GHG ''air pollutant'' for the first time under any section of the Act.

2. Relationships Among Various Stationary Source Programs

As a result of other interactions among various CAA sections, a decision to act under one part of the CAA may preclude action under another part of the Act. These interactions reflect the Act's different regulatory treatment of pollutants meeting different criteria, and prevent duplicative regulation. For instance, listing a pollutant under section 108(a), which leads to setting a NAAQS and developing SIPs for the pollutant, generally precludes listing the same air pollutant as a HAP under section 112(b), which leads to every major source of a listed HAP having to comply with MACT standards for the HAP. CAA section 112(b)(2).[97] Listing an air pollutant under section 108(a) also preludes regulation of that air pollutant from existing sources under section 111(d), which is intended to provide for regulation of air pollutants not otherwise subject to the major regulatory programs under the Act. CAA section 111(d)(1)(A).

Similarly, regulation of a substance under Title VI precludes listing that substance as a HAP under section 112(b) based solely on the adverse effects on the environment of that air pollutant. CAA section 112(b)(2). Moreover, listing an air pollutant as a HAP under section 112(b) generally precludes regulation of that air pollutant from existing sources under section 111(d). CAA section 111(d)(1)(A).[98] Finally, section 112(b)(6) provides that the provisions of the PSD program ''shall not apply to pollutants listed under [section 112].'' CAA section 112(b)(6), 42 U.S.C. 7412(b)(6)

V. Endangerment Analysis and Issues

In this section, we present our work to date on an endangerment analysis in response to the Supreme Court's decision in *Massachusetts* v. *EPA*. As explained previously, the Supreme Court remanded EPA's denial of the ICTA petition and ruled that EPA must either decide whether GHG emissions from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or explain why scientific uncertainty is so profound that it prevents making a reasoned judgment on such a determination.

In response to the remand, EPA analyzed synthesis reports and studies on how elevated concentrations of GHGs in the atmosphere, and other factors, contribute to climate change, and how climate change is affecting, and may affect in the future, human health and welfare, primarily within the United States. We also analyzed direct GHG effects on human health and welfare, i.e., those effects from elevated concentrations of GHGs that do not occur via climate change. This information, summarized briefly below, is contained in the Endangerment Technical Support Document found in the docket for today's notice. In addition, we compiled information concerning motor vehicle GHG emissions to assess whether motor vehicles cause or contribute to elevated concentrations of GHGs in the atmosphere. Information on motor vehicle emissions is contained in the Section 202 Technical Support Document, also found in the docket.

As discussed above, making an endangerment finding under one section of the CAA has implications for other sections of the Act. In this ANPR, we consider, and seek comment on these implications and other questions relevant to making an endangerment finding regarding GHG emissions.

This section is organized as follows. Section A discusses the legal framework for the endangerment analysis. Section B provides information on how ''air pollution'' could be defined for purposes of the endangerment analysis, as well as a summary of the science regarding GHGs and climate change and their effects on health and welfare. Section C uses the information on emissions of GHGs from the mobile source categories relevant to the ICTA Petition to frame a discussion about whether GHGs as ''air pollutants'' ''cause or contribute'' to ''air pollution'' which may reasonably be anticipated to endanger public health or welfare.

A. Legal Framework

The endangerment language relevant to the ICTA petition is contained in section 202(a) of the CAA. As explained previously, it is similar to endangerment language in many other provisions of the Act and establishes a two-part test. First, the Administrator must decide if, in his judgment, air pollution may reasonably be anticipated to endanger public health or welfare. Second, the Administrator must decide whether, in his judgment, emissions of any air pollutant from new motor vehicles or engines cause or contribute to this air pollution.

1. Origin of Current Endangerment and Cause or Contribute Language

The endangerment language in section 202(a) and other provisions of the CAA share a common legislative history that sheds light on the meaning of this language. As part of the 1977 amendments to the CAA, Congress added or revised endangerment language in various sections of the Act. The legislative history of those amendments, particularly the report by the House Committee on Interstate and Foreign Commerce, provides important information regarding Congress' intent

[97] ''No air pollutant which is listed under section 108(a) may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 108(a) or to any pollutant which is in a class of pollutants listed under such section.''

[98] However, see 70 FR 15994, 16029–32 (2005) (explaining EPA's interpretation of the conflicting amendments to section 111(d) regarding HAPs).

when it revised this language. *See* H.R. Rep. 95–294 (1977), *as reprinted in 4* A Legislative History of the Clean Air Act Amendments of 1977 at 2465 (hereinafter ''LH'').

a. *Ethyl Corp.* v. *EPA*

In revising the endangerment language, Congress relied heavily on the approach discussed in a federal appeals court opinion interpreting the pre-1977 version of CAA section 211. In *Ethyl Corp* v. *EPA,* 541 F.2d 1 (D.C. Cir. 1976), the en banc (i.e. full) court reversed a 3-judge panel decision regarding an EPA rule restricting the content of lead in leaded gasoline.[99] The en banc court began its opinion by stating:

> Man's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations.

541 F.2d at 6. After reviewing the relevant facts and law, the full-court evaluated the statutory language at issue to see what level of ''certainty [was] required by the Clean Air Act before EPA may act.'' *Id.*

By a 2–1 vote, the 3-judge panel had held that the statutory language ''will endanger'' required proof of actual harm, and that the actual harm had to come from fuels ''in and of themselves.'' *Id.* at 12. The en banc court rejected this approach, finding that the term ''endanger'' allowed the Administrator to act when harm is threatened, and did not require proof of actual harm. *Id.* at 13. ''A statute allowing for regulation in the face of danger is, necessarily, a precautionary statute.'' *Id.* Optimally, the court held, regulatory action would not only precede, but prevent, a perceived threat. *Id.*

The court also rejected petitioners' argument that any threatened harm must be ''probable'' before regulation was authorized. Specifically, the court recognized that danger ''is set not by a fixed probability of harm, but rather is composed of reciprocal elements of risk and harm, or probability or severity.'' *Id.* at 18. Next, the court held that EPA's evaluation of risk is necessarily an exercise of judgment, and that the statute did not require a factual finding. *Id.* at 24. Thus, ultimately, the Administrator must ''act, in part on 'factual issues,' but largely on choices of policy, on an assessment of risks, [and] on predictions dealing with matters on the frontiers of scientific knowledge * * * .'' *Id.* at 29 (citations omitted). Finally, the en banc court agreed with EPA that even without the language in section 202 regarding ''cause or contribute to,'' section 211 authorized EPA to consider the cumulative impact of lead from numerous sources, not just the fuels being regulated under section 211. *Id.* at 29–31.

b. The 1977 Clean Air Act Amendments

The dissent in the original *Ethyl Corp* decision and the en banc opinion were of ''critical importance'' to the House Committee which proposed the revisions to the endangerment language in the 1977 amendments to the CAA. H.R. Rep. 95–294 at 48, 4 LH at 2515. In particular, the Committee believed the *Ethyl Corp* decision posed several ''crucial policy questions'' regarding the protection of public health and welfare.'' *Id.*[100] The Committee addressed those questions with the endangerment language that now appears in section 202(a) and several other CAA provisions—''which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.''

The Committee intended the language to serve several purposes consistent with the en banc decision in *Ethyl Corp.*[101] First, the phrases ''in his judgment'' and ''in the judgment of the Administrator'' call for the Administrator to make comparative assessment of risks and projections of future possibilities, consider uncertainties, and extrapolate from limited data. Thus, the Administrator must balance the likelihood of effects with the severity of the effects in reaching his judgment. The Committee emphasized that ''judgment'' is different from a factual ''finding.'' Importantly, projections, assessments and estimates must be reasonable, and cannot be based on a ''crystal ball inquiry.'' Moreover, procedural safeguards apply (e.g., CAA 307(d)) to the exercise of judgment, and final decisions are subject to judicial review. Also, the phrase ''in his judgment'' modifies both phrases ''cause and contribute'' and ''may reasonably be anticipated'' discussed below. H.R. Rep. 95–294 at 50–51, 4 LH at 2517–18.

As the Committee further explained, the phrase ''may reasonably be anticipated'' builds upon the precautionary and preventative goals already provided in the use of the term ''endanger.'' Thus, the Administrator is to assess current and future risks rather than wait for proof of actual harm. This phrase is also intended to instruct the Administrator to consider the limitations and difficulties inherent in information on public health and welfare. H.R. Rep. 95–294 at 51, 4 LH at 2518.

Finally, the phrase ''cause or contribute'' ensures that all sources of the contaminant which contribute to air pollution be considered in the endangerment analysis (e.g., not a single source or category of sources). It is also intended to require the Administrator to consider all sources of exposure to a pollutant (e.g., food, water, air) when determining risk. *Id.*

3. Additional Considerations for the ''Cause or Contribute'' Analysis

While the legislative history sheds light on what should be considered in making an endangerment finding, it is not clear regarding what constitutes a sufficient ''contribution'' for purposes of making a finding. The CAA does not define the concept ''cause or contribute'' and instead requires that the Administrator exercise his judgment when determining whether emissions of air pollutants cause or contribute to air pollution. As a result, the Administrator has the discretion to interpret ''cause or contribute'' in a reasonable manner when applying it to the circumstances before him.

The D.C. Circuit has discussed the concept of ''contribution'' in the context of a CAA section 213 rule for nonroad vehicles. In *Bluewater Network* v. *EPA,* 370 F.3d 1 (2004), industry argued that section 213(a)(3) requires a finding of a significant contribution before EPA could regulate, but EPA argued that the CAA requires a finding only of ''contribution.'' [102] *Id.* at 13. The court

[99] At the time of the 1973 rules requiring the reduction of lead in gasoline, section 211(c)(1)(A) of the CAA stated that the Administrator may promulgate regulations that control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emissions product of such fuel or fuel additive *will endanger the public health or welfare* * * * .

CAA section 211(c)(1)(A) (1970) (emphasis added). The italicized language in the above quote is the relevant language revised by the 1977 amendments.

[100] The Supreme Court recognized that the current language in section 202(a)(1) is ''more-protective'' than the 1970 version that was similar to the section 211 language before the D.C. Circuit in Ethyl Corp. 127 S.Ct. at 1447, fn 1.

[101] Specifically, the language (1) emphasizes the precautionary or preventive purpose of the CAA; (2) authorizes the Administrator to reasonably project into the future and weigh risks; (3) requires the consideration of the cumulative impact of all sources; (4) instructs that the health of susceptible individuals, as well as healthy adults, should be part of the analysis; and (5) indicates an awareness of the uncertainties and limitations in information available to the Administrator. H.R. Rep. 95–294 at 49–50, 4 LH at 2516–17. Congress also wanted to standardize this language across the various sections of the CAA which address emissions from both stationary and mobile sources which may reasonably be anticipated to endanger public health or welfare. H.R. Rep. 95–294 at 50, 4 LH at 2517; Section 401 of CAA Amendments of 1977.

[102] The relevant language in section 213(a)(3) reads ''[i]f the Administrator makes an affirmative

looked at the ''ordinary meaning of 'contribute''' when upholding EPA's reading. After referencing dictionary definitions of contribute,[103] the court also noted that ''[s]tanding alone, the term has no inherent connotation as to the magnitude or importance of the relevant 'share' in the effect; certainly it does not incorporate any 'significance' requirement.'' *Id.*[104] The court also found relevant the fact that section 213(a) uses the term ''significant contributor'' in some places and the term ''contribute'' elsewhere, suggesting that the ''contribute'' language invests the Administrator with discretion to exercise his judgment regarding what constitutes a sufficient contribution for the purpose of making an endangerment finding. *Id.* at 14

In the past the Administrator has looked at emissions of air pollutants in various ways to determine whether they ''cause or contribute'' to the relevant air pollution. For instance, in some mobile source rulemakings, the Administrator has looked at the percent of emissions from the regulated mobile source category compared to the total mobile source inventory for that air pollutant. *See, e.g.*, 66 FR 5001 (2001) (heavy duty engine and diesel sulfur rule). In other instances the Administrator has looked at the percent of emissions compared to the total nonattainment area inventory of the air pollution at issue. *See, e.g.*, 67 FR 68,242 (2002) (snowmobile rule). EPA has found that air pollutant emissions that amount to 1.2% of the total inventory ''contribute.'' *Bluewater Network,* 370 F.3d at 15 (''For Fairbanks, this contribution was equivalent to 1.2% of the total daily CO inventory for 2001.'').

We solicit comment on these prior precedents, including their relevance to contribution findings EPA may be considering regarding GHG emissions. Where appropriate, may the Administrator determine that emissions at a certain level or percentage contribute to air pollution in one instance, while also finding that the same level or percentage of another air pollutant and involving different air pollution, and different overall circumstances, does not contribute? When exercising his judgment, is it appropriate for the Administrator to consider not only the cumulative impact, but also the totality of the circumstances (e.g., the air pollutant, the air pollution, the type of source category, the number of sources in the source category, the number and type of other source categories that may emit the air pollutant) when determining whether the emissions ''justify regulation'' under the CAA? *See Ethyl Corp.,* 541 F.2d at 31, n62 (''Moreover, even under a cumulative impact theory emissions must make more than a minimal contribution to total exposure in order to justify regulation under § 211(c)(1)(A).'').

B. Is the Air Pollution at Issue Reasonably Anticipated to Endanger Public Health or Welfare?

This section discusses options for defining, with respect to GHGs, the ''air pollution'' that may or may not be reasonably anticipated to endanger public health or welfare, the first part of the two part endangerment test. It also summarizes the state of the science on GHGs and climate change, and relates that science to the endangerment question. We solicit comment generally on the information and issues discussed below.

1. What is the Air Pollution?

As noted above, in applying the endangerment test in section 202(a) or other sections of the Act to GHG emissions, the Administrator must define the scope and nature of the relevant ''air pollution'' that may or may not be reasonably anticipated to endanger public health or welfare. The endangerment issue discussed in today's notice involves, primarily, anthropogenic emissions of GHGs, the accumulation of GHGs in the atmosphere, the resultant impacts including climate change, and the risks and impacts to human health and welfare associated with those impacts.

a. The Six Major GHGs of Concern

The six major GHGs of concern are CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6. The IPCC focuses on these six GHGs for both scientific assessments and emissions inventory purposes because these are the six long-lived, well-mixed GHGs not controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer. These six GHGs are directly emitted by human activities, are reported annually in EPA's *Inventory of U.S. Greenhouse Gas Emissions and Sinks,* and are the common focus of the climate change research community. The ICTA petition addresses the first four of these GHGs, and the President's Executive Orders 13423 and 13432 define GHGs to include all six of these GHGs.

Carbon dioxide is the most important GHG directly emitted by human activities, and is the most significant driver of climate change. The anthropogenic combined heating effect (referred to as forcing) of CH_4, N_2O, HFCs, PFCs and SF_6 is about 40% as large as the CO_2 cumulative heating effect since pre-industrial times, according to the Fourth Assessment Report of the IPCC.

b. Emissions and Elevated Concentrations of the Six GHGs

As mentioned previously, these six GHGs can remain in the atmosphere for decades to centuries. Therefore, these GHGs, once emitted, become well mixed throughout the global atmosphere regardless of their emission origin, such that their average concentrations over the U.S. are roughly the same as the global average. This also means that current GHG concentrations are the cumulative result of both historic and current emissions, and that future concentrations will be the cumulative result of historic, current and future emissions.

Greenhouse gases trap some of the Earth's heat that would otherwise escape to space. The additional heating effect caused by the buildup of anthropogenic GHGs in the atmosphere enhances the Earth's natural greenhouse effect and causes global temperatures to increase, with associated climatic changes (e.g., change in precipitation patterns, rise in sea levels, and changes in the frequency and intensity of extreme weather events). Current atmospheric concentrations of all of these GHGs are significantly higher than pre-industrial (~1750) levels as a result of human activities. Atmospheric concentrations of CO_2 and other GHGs

determination under paragraph (2) the Administrator shall, * * * promulgate (and from time to time revise) regulations containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives or engines used in locomotives) which in the Administrator's judgment cause, or contribute to, such air pollution.'' Notably, CAA section 213(a)(2), which is referenced in section 213(a)(3), requires that the ''Administrator shall determine * * * whether emissions of carbon monoxide, oxides of nitrogen, and volatile organic compounds from new and existing nonroad engines or nonroad vehicles (other than locomotives or engines used in locomotives) are *significant contributors* to ozone or carbon monoxide concentrations in more than 1 area which has failed to attain the national ambient air quality standards for ozone or carbon monoxide'' (emphasis added).

[103] Specifically, the decision noted that '' 'contribute' means simply 'to have a share in any act or effect,' *Webster's Third New International Dictionary* 496 (1993), or 'to have a part or share in producing,' 3 *Oxford English Dictionary* 849 (2d ed. 1989).'' 370 F.3d at 13.

[104] The court explained, ''The repeated use of the term 'significant' to modify the contribution required for all nonroad vehicles, coupled with the omission of this modifier from the 'cause, or contribute to' finding required for individual categories of new nonroad vehicles, indicates that Congress did not intend to require a finding of 'significant contribution' for individual vehicle categories.'' *Id.*

are projected to continue to climb over the next several decades.

The scientific literature that assesses the potential risks and end-point impacts of climate change (driven by the accumulation of atmospheric concentrations of GHGs) does not assess these impacts on a gas-by-gas basis. Observed climate change and associated effects are driven by the buildup of all GHGs in the atmosphere, as well as other natural and anthropogenic factors that influence the Earth's energy balance. Likewise, the future projections of climate change that have been done are driven by emission scenarios of all six GHGs, as well as other pollutants, many of which are already regulated in the U.S. and other countries.

For these reasons, EPA is considering defining the ''air pollution'' related to GHGs as the elevated combined current and projected atmospheric concentration of the six GHGs. This approach is consistent with other provisions of the CAA and previous EPA practice under the CAA, where separate air pollutants from different sources but with common properties may be treated as a class (e.g., Class I and Class II substances under Title VI of the CAA). It also addresses the cumulative effect that the elevated concentrations of the six GHGs have on climate, and thus on different elements of health, society and the environment. We seek comment on this potential approach, as well as other alternative ways to define ''air pollution.'' One alternative would be to define air pollution as the elevated concentration of an individual GHG; however, in this case the Administrator may still have to consider the impact of the individual GHG in combination with the impacts caused by the elevated concentrations of the other GHGs.

c. Other Anthropogenic Factors That Have a Climatic Warming Effect Beyond the Six Major GHGs

There are other GHGs and aerosols that have climatic warming effects: water vapor, chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs), halons, stratospheric and tropospheric ozone (O_3), and black carbon. Each of these is discussed here. We seek comment on whether and how they should be considered in the definition of ''air pollution'' for purposes of an endangerment finding.

Water vapor is the most abundant naturally occurring GHG and therefore makes up a significant share of the natural, background greenhouse effect. However, water vapor emissions from human activities have only a negligible effect on atmospheric concentrations of water vapor. Significant changes to global atmospheric concentrations of water vapor occur indirectly through human-induced global warming, which then increases the amount of water vapor in the atmosphere because a warmer atmosphere can hold more moisture. Therefore, changes in water vapor concentrations are not an initial driver of climate change, but rather an effect of climate change which then acts as a positive feedback that further enhances warming. For this reason, the IPCC does not list direct emissions of water vapor as an anthropogenic forcing agent of climate change, but does include this water vapor feedback mechanism in response to human-induced warming in all modeling scenarios of future climate change. Based on this recognition that anthropogenic emissions of water vapor are not a significant driver of anthropogenic climate change, EPA's annual *Inventory of U.S. Greenhouse Gas Emissions and Sinks* does not include water vapor, and GHG inventory reporting guidelines under the United Nations Framework Convention on Climate Change (UNFCCC) do not require data on water vapor emissions.

Water vapor emissions may be an issue for concern when they are emitted by aircraft at high altitudes, where, under certain conditions, they can lead to the formation of condensation trails, referred to as contrails. Similar to high-altitude, thin clouds, contrails have a warming effect. Extensive cirrus clouds can also develop from aviation contrails, and increases in cirrus cloud cover would also have a warming effect. The IPCC Fourth Assessment Report estimated a very small positive radiative forcing effect for linear contrails, with a low degree of scientific understanding. Unlike the warming effects associated with the six long-lived, well-mixed GHGs, the warming effects associated with contrails or contrail-induced cirrus cloud cover are more regional and temporal in nature. Further discussion of aviation contrails can be found in Section VI on mobile sources. EPA invites input and comment on the scientific and policy issues related to consideration of water vapor's association with aviation contrails in an endangerment analysis.

The CFCs, HCFCs, and halons are all strong anthropogenic GHGs that are long-lived in the atmosphere and are adding to the global anthropogenic heating effect. Therefore, these gases share common climatic properties with the six GHGs discussed above. The production and consumption of these substances (and hence their anthropogenic emissions) are being controlled and phased out, not because of their effects on climate change, but because they deplete stratospheric O_3, which protects against harmful ultraviolet B (UVB) radiation. The control and phase-out of these substances in the U.S. and globally is occurring under the Montreal Protocol on Substances that Deplete the Ozone Layer, and in the U.S. under Title VI of the CAA as well.[105] Therefore, the climate change research and policy community typically does not focus on these substances, precisely because they are essentially already being 'taken care of' with non-climate policy mechanisms. For example, the UNFCCC does not address these substances, and instead defers their treatment to the Montreal Protocol. As mentioned above, the President's Executive Orders 13423 and 13432 do not include these substances in the definition of GHGs. For these reasons, EPA's preliminary conclusion is that we would not include CFCs, HCFCs and halons in the definition of ''air pollution'' for purposes of an endangerment finding. We seek comment on this issue.

The depletion of stratospheric O_3 due to CFCs, HCFCs, and other ozone-depleting substances has resulted in a small cooling effect on the planet.

Increased concentrations of tropospheric O_3 are causing a significant anthropogenic warming effect, but, unlike the long-lived six GHGs, tropospheric O_3 has a short atmospheric lifetime (hours to weeks), and therefore its concentrations are more variable over space and time. For these reasons, its global heating effect and relevance to climate change tends to entail greater uncertainty compared to the well-mixed, long-lived GHGs. More importantly, tropospheric ozone is already listed as a NAAQS pollutant and is regulated through SIPs and other measures under the CAA, due to its direct health effects including increases in respiratory infection, medicine use by asthmatics, emergency department visits and hospital admissions, and its potential to contribute to premature death, especially in susceptible populations such as asthmatics,

[105] Under the Montreal Protocol, production and consumption of CFCs were phased out in developed countries in 1996 (with some essential use exemptions) and are scheduled for phase-out by 2010 in developing countries (with some essential use exemptions). For halons the schedule was 1994 for phase out in developed countries and 2010 for developing countries; HCFC production was frozen in 2004 in developed countries, and in 2016 production will be frozen in developing countries; and HCFC consumption phase-out dates are 2030 for developed countries and 2040 in developing countries.

children and the elderly. Tropospheric O_3 is not addressed under the UNFCCC. For these reasons, EPA's preliminary conclusion is that we would not include tropospheric O_3 in the definition of ''air pollution'' for purposes of an endangerment finding because, as with CFCs, HCFCs and halons, it is already being addressed by regulatory actions that control precursor emissions (NO_X and volatile organic compounds (VOCs)) from major U.S. sources. We invite comment on this issue.

Black carbon is an aerosol particle that results from incomplete combustion of the carbon contained in fossil fuels, and it remains in the atmosphere for about a week. Black carbon causes a warming effect by absorbing incoming sunlight in the atmosphere (whereas GHGs cause warming by trapping outgoing, infrared heat), and by darkening bright surfaces such as snow and ice, which reduces reflectivity and increases absorption of sunlight at the surface. Some recent research,[106] published after the IPCC Fourth Assessment Report, has suggested that black carbon may play a larger role in warming than previously thought. Like other aerosols, black carbon can also alter the reflectivity and lifetime of clouds, which in turn can have an additional climate effect. How black carbon and other aerosols alter cloud properties is a key source of uncertainty in climate change science. Given these reasons, there is considerably more uncertainty associated with black carbon's warming effect compared to the estimated warming effect of the six long-lived GHGs.

Black carbon is also co-emitted with organic carbon, which tends to have a cooling effect on climate because it reflects and scatters incoming sunlight. The ratio of black carbon to organic carbon varies by fuel type and by combustion efficiency. Diesel vehicles, for example, emit a much greater portion of black carbon, whereas forest fires tend to emit much more organic carbon. The net effect of black carbon and organic carbon on climate should therefore be considered. Also, black carbon is a subcomponent of particulate matter (PM), which is regulated as a NAAQS pollutant under the CAA due to its direct health effects caused by inhalation. Diesel vehicles are estimated to be the largest source of black carbon in the U.S., but these emissions are expected to decline substantially over the coming decades due to recently promulgated EPA regulations targeting $PM_{2.5}$ emissions from on-road and off-road diesel vehicles (the Highway Diesel Rule and the Clean Air Nonroad Diesel Rule, the Locomotive and Marine Compression Ignition Rule). Non-regulatory partnership programs such as the National Clean Diesel Campaign and Smartway are reducing black carbon as well. In sum, black carbon has different climate properties compared to long-lived GHGs, and major U.S. sources of black carbon are already being aggressively reduced through regulatory actions due to health concerns. Nevertheless, EPA has recently received petitions asking the Agency to reduce black carbon emissions from some mobile source categories (see Section VI.). Therefore, EPA seeks comment on how to treat black carbon (and co-emitted organic carbon) regarding the definition of ''air pollution'' in the endangerment context.

[106] Ramathan, V, and G. Carmichael (2008) Global and regional climate changes due to black carbon. *Nature Geoscience,* 1: 221–227.

2. Science Summary

The following provides a summary of the underlying science that was reviewed and utilized in the Endangerment Technical Support Document for the endangerment discussion, which in turn relied heavily on the IPCC Fourth Assessment Report. We seek comment on the best available science for purposes of the endangerment discussion, and in particular on the use of the more recent findings of the U.S. Climate Change Science Program.

a. Observed Global Effects

The global atmospheric CO_2 concentration has increased about 35% from pre-industrial levels to 2005, and almost all of the increase is due to anthropogenic emissions. The global atmospheric concentration of CH_4 has increased by 148% since pre-industrial levels. Current atmospheric concentrations of CO_2 and CH_4 far exceed the recorded natural range of the last 650,000 years. The N_2O concentration has increased 18%. The observed concentration increase in these non-CO_2 gases can also be attributed primarily to anthropogenic emissions. The industrial fluorinated gases, HFCs, PFCs, and SF_6, have relatively low atmospheric concentrations but are increasing rapidly; these gases are entirely anthropogenic in origin.

Current ambient concentrations of CO_2 and other GHGs remain well below published thresholds for any direct adverse health effects, such as respiratory or toxic effects.

The global average net effect of the increase in atmospheric GHG concentrations, plus other human activities (e.g., land use change and aerosol emissions), on the global energy balance since 1750 has been one of warming. This total net radiative forcing (a measure of the heating effect caused by changing the Earth's energy balance) is estimated to be +1.6 Watts per square meter (W/m^2). The combined radiative forcing due to the cumulative (i.e., 1750 to 2005) increase in atmospheric concentrations of CO_2, CH_4, and N_2O is +2.30 W/m^2. The rate of increase in positive radiative forcing due to these three GHGs during the industrial era is very likely to have been unprecedented in more than 10,000 years. The positive radiative forcing due to the increase in CO_2 concentrations is the largest (+1.66 W/m^2). The increase in CH_4 concentrations is the second largest source of positive radiative forcing (+0.48 W/m2). The increase in N_2O has a positive radiative forcing of +0.16 W/m^2.

Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level. Global mean surface temperatures have risen by 0.74°C (1.3°F) over the last 100 years. The average rate of warming over the last 50 years is almost double that over the last 100 years. Global mean surface temperature was higher during the last few decades of the 20th century than during any comparable period during the preceding four centuries.

Most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations. Global observed temperatures over the last century can be reproduced only when model simulations include both natural and anthropogenic forcings, i.e., simulations that remove anthropogenic forcings are unable to reproduce observed temperature changes. Thus, the warming cannot be explained by natural variability alone.

Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases. Observations show that changes are occurring in the amount, intensity, frequency and type of precipitation. There is strong evidence that global sea level gradually rose in the 20th century and is currently rising at an increased rate. Widespread changes in extreme temperatures have been observed in the last 50 years. Globally, cold days, cold nights, and frost have become less frequent, while hot days, hot nights, and heat waves have become more frequent.

The Endangerment Technical Support Document provides evidence that the U.S. and the rest of the world are experiencing effects from climate change now.

b. Observed U.S. Effects

U.S. temperatures also warmed during the 20th and into the 21st century. U.S. temperatures are now approximately 1.0 °F warmer than at the start of the 20th century, with an increased rate of warming over the past 30 years. The past nine years have all been among the 25 warmest years on record for the contiguous U.S., a streak which is unprecedented in the historical record. Like the average global temperature increase, the observed temperature increase for North America has been attributed to the global buildup of anthropogenic GHG concentrations in the atmosphere.

Widespread changes in extreme temperatures have been observed in the last 50 years across all world regions including the U.S. Cold days, cold nights, and frost have become less frequent, while hot days, hot nights, and heat waves have become more frequent.

Total annual precipitation has increased over the U.S. on average over the last century (about 6%), and there is evidence of an increase in heavy precipitation events. Nearly all of the Atlantic Ocean shows sea level rise during the past decade with highest rate in areas that include the U.S. east coast.

Observations show that climate change is currently impacting the nation's ecosystems and services in significant ways.

c. Projected Effects

The Endangerment Technical Support Document, the IPCC Fourth Assessment Report, and a report under the U.S. Climate Change Science Program, provide projections of future ambient concentrations of GHGs, future climate change, and future anticipated effects from climate change under various scenarios. This section summarizes some of the key global projections, such as changes in global temperature, as well as those particular to North America and the United States.

Overall risk to human health, society and the environment increases with increases in both the rate and magnitude of climate change. Climate warming may increase the possibility of large, abrupt, and worrisome regional or global climatic events (e.g., disintegration of the Greenland Ice Sheet or collapse of the West Antarctic Ice Sheet). The majority of the climate change impacts literature assesses the potential effects on health, society and the environment due to projected changes in average conditions (e.g., temperature increase, precipitation change, sea level rise) and do not take into account how the frequency and severity of extreme events due to climate change may cause certain additional impacts. Likewise, impact studies typically do not account for large, abrupt climatic events, and generally consider rates of warming that would result from climate sensitivities [107] within the most likely range, not at the tails of the distribution. To weigh the full range of risks and impacts, it is important to consider these possible extreme outcomes, including those that are of low probability.

i. Global Effects

The majority of future reference-case scenarios (assuming no explicit GHG mitigation actions beyond those already enacted) project an increase of global GHG emissions over the century, with climbing GHG concentrations and associated increases in radiative forcing and average global temperatures.

Projected ambient concentrations of CO_2 and other GHGs remain well below published thresholds for any direct adverse health effects, such as respiration or toxic effects.

Through about 2030, the global warming rate is affected little by different future scenario assumptions or different model sensitivities, because there is already some degree of commitment to future warming given past and present GHG emissions. By mid-century, the choice of scenario becomes more important for the magnitude of the projected warming because only about a third of that warming is projected to be due to climate change that is already committed. By the end of the century, projected average global warming (compared to average temperature around 1990) varies significantly by emissions scenario, with IPCC's best estimates ranging from 1.8 to 4.0 °C (3.2 to 7.2 °F), with a fuller likely range of 1.1 to 6.4 °C (2.0 to 11.5 °F), which takes into account a wider range of future emission scenarios and a wider range of uncertainties.[108]

The IPCC identifies the most vulnerable world regions as the Arctic, because of high rates of projected warming on natural systems; Africa, especially the sub-Saharan region, because of current low adaptive capacity; small islands, due to high exposure of population and infrastructure to risk of sea-level rise and increased storm surge; and Asian mega deltas, due to large populations and high exposure to sea level rise, storm surge, and river flooding. Climate change impacts in certain regions of the world may exacerbate problems that raise humanitarian and national security issues for the U.S. Climate change has been described as a potential threat multiplier regarding national security issues.

ii. United States Effects

Projected global warming is anticipated to lead to effects in the U.S. For instance, all of the U.S. is very likely to warm during this century, and most areas of the U.S. are expected to warm by more than the global average. The U.S, along with the rest of the world, is projected to see an increase in the intensity of precipitation events and the risk of flooding, greater runoff and erosion, and thus the potential for adverse water quality effects.

Severe heat waves are projected to intensify in magnitude, frequency, and duration over the portions of the U.S. where these events already occur, with likely increases in mortality and morbidity, especially among the elderly, young, and frail. Warmer temperatures can also lead to fewer cold-related deaths. It is currently not possible to quantify the balance between decreased cold-related deaths and increased heat-related deaths attributable to climate change over time.

The IPCC projects with virtual certainty (i.e., greater than 99% likelihood) declining air quality in cities due to warmer days and nights, and fewer cold days and nights, and/or more frequent hot days and nights over most land areas, including the U.S. Climate change is expected to lead to increases in regional ozone pollution, with associated risks for respiratory infection, aggravation of asthma, and potential premature death, especially for people in susceptible groups. Climate change effects on ambient PM are currently less certain.

Additional human health concerns include a change in the range of vector-

[107] "Climate sensitivity" is a term used to describe how much long-term global warming occurs if global atmospheric concentrations of CO_2 are doubled compared to their pre-industrial levels. The IPCC Fourth Assessment Report states that climate sensitivity is very likely greater than 1.5°C (2.7 °F) and likely to lie in the range of 2 °C to 4.5 °C (3.6 °F to 8.1 °F), with a most likely value of about 3 °C (5.4 °F), and that a climate sensitivity higher than 4.5 °C cannot be ruled out.

[108] The IPCC scenarios are also described in the Technical Support Document and include a range of future global emission scenarios and a range of climate sensitivities (which measure how much global warming occurs for a given increase in global CO_2 concentrations).

borne diseases, and a likely trend towards more intense hurricanes (even though any single hurricane event cannot be attributed to climate change) and other extreme weather events. For many of these issues, sensitive populations, such as the elderly, young, asthmatics, the frail and the poor, are most vulnerable.

Moderate climate change in the early decades of the century is projected to increase aggregate yields of rainfed agriculture in the United States by 5–20%. However, as temperatures continue to rise, grain and oilseed crops will increasingly experience failure, especially if climate variability increases and precipitation lessens or becomes more variable. How climatic variability and extreme weather events will continue to change under a changing climate is a key uncertainty, and these events also have the potential to offset the benefits of CO_2 fertilization and a longer growing season.

Climate change is projected to constrain over-allocated water resources in the U.S., increasing competition among agricultural, municipal, industrial, and ecological uses. Rising temperatures will diminish snowpack and increase evaporation, affecting seasonal availability of water.

Disturbances like wildfire and insect outbreaks are increasing and are likely to intensify in a warmer future with drier soils and longer growing seasons. Overall forest growth in the U.S. will likely increase by 10–20% as a result of extended growing seasons and elevated CO_2 over the next century, but with important spatial and temporal variation. Although recent climate trends have increased vegetation growth in parts of the United States, continuing increases in disturbances are likely to limit carbon storage, facilitate invasive species, and disrupt ecosystem services.

The U.S. will be affected by global sea level rise, which is expected to increase between 0.18 and 0.59 meters by the end of the century relative to around 1990. These numbers represent the lowest and highest projections of the 5 to 95% ranges for all scenarios considered collectively and include neither uncertainty in carbon cycle feedbacks nor rapid dynamical changes in ice sheet flow. U.S. coastal communities and habitats will be increasingly stressed by climate change interacting with development and pollution. Sea level is already rising along much of the coast, and the rate of change is expected to increase in the future, exacerbating the impacts of progressive inundation, storm-surge flooding, and shoreline erosion.

Climate change is likely to affect U.S. energy use (e.g., heating and cooling requirements), and energy production (e.g., effects on hydropower), physical infrastructures (including coastal roads, railways, transit systems and runways) and institutional infrastructures. Climate change will likely interact with and possibly exacerbate ongoing environmental change and environmental pressures in some settlements, particularly in Alaska where indigenous communities are facing major environmental and cultural impacts.

3. Endangerment Discussion Regarding Air Pollution

The Administrator must exercise his judgment in evaluating whether the first part of the endangerment test is met, i.e., whether air pollution (e.g., the elevated concentrations of GHGs) is reasonably anticipated to endanger public health or welfare. As discussed above, in exercising his judgment it is appropriate for the Administrator to make comparative assessments of risk and projections of future possibilities, consider uncertainties, and extrapolate from limited data. The precautionary nature of the statutory language also means that the Administrator should act to prevent harm rather than wait for proof of actual harm.

The scientific record shows there is compelling and robust evidence that observed climate change can be attributed to the heating effect caused by global anthropogenic GHG emissions. The evidence goes beyond increases in global average temperature to include observed changes in precipitation patterns, sea level rise, extreme hot and cold days, sea ice, glaciers, ecosystem functioning and wildlife patterns. Global warming trends over the last 50 years stand out as significant compared to estimated global average temperatures for at least the last few centuries. Some degree of future warming is now unavoidable given the current buildup of atmospheric concentrations of GHGs, as the result of past and present GHG emissions. Based on the scientific evidence, it is reasonable to conclude that future climate change will result from current and future emissions of GHGs. Future warming over the course of the 21st century, even under scenarios of low emissions growth, is very likely to be greater than observed warming over the past century.

The range of potential impacts that can result from climate change spans many elements of the global environment, and all regions of the U.S. will be affected in some way. The U.S. has a long and populous coastline. Sea level rise will continue and exacerbate storm-surge flooding and shoreline erosion. In areas where heat waves already occur, they are expected to become more intense, more frequent, and longer lasting. Wildfires and the wildfire season are already increasing and climate change is expected to continue to worsen conditions that facilitate wildfires. Where water resources are already scarce and over-allocated in the western U.S., climate change is expected to put additional strain on these water management issues for municipal, agricultural, energy and industrial uses. Climate change also introduces an additional stress on ecosystems which are already affected by development, habitat fragmentation, and broken ecological dynamics. There is a wide range in the magnitude of these estimated impacts, with there being more confidence in the occurrence of some effects and less confidence in the occurrence of others.

In addition to the effects from changes in climate, there are some additional welfare effects that occur directly from the anthropogenic GHG emissions themselves. For example, ocean acidification occurs through elevated concentrations of CO_2, and crop and other vegetation growth can be enhanced through elevated CO_2 concentrations as well.

Current and projected levels of ambient concentrations of the six GHGs are not expected to cause any direct adverse health effects, such as respiratory or toxic effects, which would occur as a result of the elevated GHG concentrations themselves rather than through the effects of climate change. However, there are indirect human health risks (e.g., heat-related mortality, exacerbated air quality, extreme events) and benefits (e.g., less cold-related mortality) that occur due to climate change. We seek comment on how these human health impacts should be characterized under the CAA for purposes of an endangerment analysis.

Some elements of human health, society and the environment may benefit from climate change (e.g., short-term increases in agricultural yields, less cold-related mortality). We seek comment on how the potential for some benefits should be viewed against the full weight of evidence showing numerous risks and the potential for adverse impacts.

Quantifying the exact nature and timing of impacts due to climate change over the next few decades and beyond, and across all vulnerable elements of U.S. health, society and the environment, is currently not possible. However, the full weight of evidence as summarized above and as documented in the Endangerment Technical Support Document points towards the robust conclusion that expected rates of climate change (driven by past, present and plausible future GHG emissions) pose a number of serious risks to the U.S., even if the exact nature of the risks is difficult to quantify with confidence. The uncertainties in this context can also mean that future rates of climate change are being underestimated, and that the potential for associated and difficult-to-predict-and-quantify extreme events is not adequately incorporated into impact assessments. The scientific literature states that risk increases with increases in both the rate and magnitude of climate change. We solicit comment on how these uncertainties should be considered.

We seek comment on whether, in light of the precautionary nature of the statutory language, the Administrator needs to find that current levels of GHG concentrations endanger public health or welfare now. As noted above, the fact that GHGs remain in the atmosphere for decades to centuries means that future concentrations are dependent not only on tomorrow's emissions, but also on today's emissions. Should the Administrator consider both current and projected future elevated concentrations of GHGs, as well as the totality of the observed and projected effects that result from current and projected concentrations? Or should the Administrator focus on future projected elevated concentrations of GHGs and their projected effects in the United States because they are larger and of greater concern than current GHG concentrations and observed effects?

In sum, EPA invites comment on all issues relevant to making an endangerment finding, including the scientific basis supporting a finding that there is or is not endangerment under the CAA, as well as the potential scope of the finding (i.e., public health, welfare, or both).

C. Illustration for the ''Cause or Contribute'' Part of the Endangerment Discussion: Do emissions of air pollutants from motor vehicles or fuels cause or contribute to the air pollution that may reasonably be anticipated to endanger public health or welfare in the United States?

1. What Is/Are the Air pollutant(s)?

a. Background and Context

If the Administrator, in his judgment, finds that GHG ''air pollution'' may reasonably be anticipated to endanger public health or welfare, he must then define ''air pollutant(s)'' for purposes of making the ''cause or contribute'' determination. The question is whether the ''air pollutants'' to be evaluated for ''cause or contribute'' should be the individual GHGs, or whether the ''air pollutant'' is one or more classes of GHGs as a group.

We recognize that the alternative definitions could have important implications for how GHGs are treated under other provisions of the Act. The Administrator seeks comment on these options, and is particularly interested in views regarding the implications for the potential future regulation of GHGs under other parts of the Act.

b. Defining ''Air Pollutant'' as Each Individual Greenhouse Gas

Under this approach, the Administrator could define ''air pollutant'' as each individual GHG rather than as GHGs as a collective whole for the purposes of assessing ''cause or contribute.'' The Administrator would evaluate each individual GHG to determine if it causes, or contributes to, the elevated combined level of GHG concentrations.

This approach enables an evaluation of the unique characteristics and properties of each GHG (e.g., radiative forcing, lifetimes, etc.), as well as current and projected emissions. This facilitates a customized approach accounting for these factors. This approach also is consistent with the approach taken in several federal GHG programs which target reductions of individual greenhouse gases. For example, EPA manages a variety of partnership programs aimed at reducing emissions of specific sources of methane and the fluorinated gases (HFCs, PFCs and SF_6).

c. Defining ''Air Pollutants'' Collectively as a Class of Greenhouse Gases

Under this approach, the Administrator could define the ''air pollutant'' as (a) the collective group of the six GHGs discussed above (CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6), (b) the collective group of the specific GHGs that are emitted from the relevant source category at issue in the endangerment finding (e.g., for section 202 sources it would be CO_2, CH_4, N_2O, and HFCs), or (c) other reasonable groupings.

There are several federal and state climate programs, such as EPA's Climate Leaders program, DOE's 1605b program, and Multi-state Climate Registry, that encourage firms to report (and reduce) emissions of all six GHGs, recognizing that the non-CO_2 GHG emissions are a significant part of the atmospheric buildup of GHG concentrations and thus radiative forcing. In addition, the President's recent 2007 Executive Orders (13423 and 13432) and his 2002–2012 intensity goal both encompass the collective emissions of all six GHGs. Consideration of a class of gases collectively takes into account the multiple effects of mitigation options and technologies on each gas, thus enabling a more coordinated approach in addressing emissions from a source. For example, collection and combustion of fugitive methane will lead to net increases in CO_2 and possibly nitrous oxide emissions, but this is nevertheless desirable from an overall mitigation perspective given the lower total radiative forcing.

2. Discussion of ''Cause or Contribute''

Once the ''air pollutant(s)'' is defined, the Administrator must look at the emissions of the air pollutant from the relevant source category in determining whether those emissions cause or contribute to the air pollution he has determined may reasonably be anticipated to endanger public health or welfare. There arguably are many possible ways of assessing ''cause and contribute'' and different approaches have been used in previous endangerment determinations under the CAA. For example, EPA could consider how emissions from the relevant source category would compare as a share of the following:

- Total global aggregated emissions of the 6 GHGs discussed in the definition of ''air pollution'';
- Total aggregated U.S. emissions of the 6 GHGs;
- Total global emissions of the individual GHG in question;
- Total U.S. emissions of the individual GHG in question; and
- Total global atmospheric concentrations of the GHG in question.

In the past, the smallest level or amount of emissions that the Administrator determined ''contributed'' to the air pollution at issue was just less than 1% (67 FR 68242 (2002)). We solicit comment on other factors that may be relevant to a contribution determination for GHG emissions. For example, given the global nature of the air pollution being addressed in this rulemaking, one might expect that the percentage contribution of specific GHGs and sectors would be much smaller than for previous rulemakings when the nature of the air pollution at issue was regional or local. On an absolute basis, a small U.S. GHG source on a global scale may have emissions at the same level as one of the largest sources in a single small to medium size country, and given the large size of the global denominator, even sectors with significant emissions could be very small in percentage terms.

In addition, EPA notes that the EPA promotes the reduction of particular GHG emissions through a variety of voluntary programs (e.g., EPA's domestic CH_4 partnership programs and the international Methane to Markets Partnership (launched in 2004)). EPA requests comment on how these and other efforts to encourage the voluntary reductions in even small amounts of GHG emissions are relevant to decisions about what level of ''contribution'' merits mandatory regulations.

Below we use the section 202 source category to illustrate these and other various ways to consider and compare source category GHG emissions for the ''cause or contribute'' analysis. In keeping with the discussion above regarding possible definitions of ''air pollutant,'' we provide the information on an individual GHG and collective GHG basis. In addition, we raise various policy considerations that could be relevant to a ''cause or contribute'' determination. EPA invites comment on the various approaches, data, and policy considerations discussed below.

a. Overview of Section 202 Source Categories

The relevant mobile sources under section 202(a)(1) of the Clean Air Act are ''any class or classes of new motor vehicles or new motor vehicle engines, * * * '' CAA section 202(a)(1). To support this illustrative assessment, EPA analyzed historical GHG emissions data for motor vehicles and motor vehicle engines in the United States from 1990 to 2006.[109]

The motor vehicles and motor vehicle engines (hereinafter ''section 202 source categories'') addressed include passenger cars, light-duty trucks, motorcycles, buses, medium/heavy-duty trucks, and cooling.[110] Of the six primary GHGs, four are associated with section 202 source categories: CO_2, CH_4, N_2O, and HFCs.

A summary of the section 202 emissions information is presented here, and a more detailed description along with data tables is contained in the Emissions Technical Support Document. All annual emissions data are considered on a CO_2 equivalent basis.

b. Carbon Dioxide Emissions From Section 202 Sources

CO_2 is emitted from motor vehicles and motor vehicle engines during the fossil fuel combustion process. During combustion, the carbon stored in the fuels is oxidized and emitted as CO_2 and smaller amounts of other carbon compounds.[111]

CO_2 is the dominant GHG emitted from motor vehicles and motor vehicle engines, and the dominant GHG emitted in the U.S. and globally.[112] CO_2 emissions from section 202 sources grew by 32% between 1990 and 2006, largely due to increased CO_2 emissions from light-duty trucks (61% since 1990) and medium/heavy-duty trucks (76%). Emissions of CO_2 from section 202 sources, and U.S. and global emissions are presented below in Table V–1.

TABLE V–1—SECTION 202 CO_2, U.S. AND GLOBAL EMISSIONS

U.S. Emissions	2006	Sec 202 CO_2 share (percent)
Section 202 CO_2	1,564.6	
All U.S. CO_2	5983.1	26.2
U.S. emissions of Sec 202 GHG	1,665.4	93.9
All U.S. GHG emissions	7,054.2	22.2%
Global Emissions	**2000**	**Sec 202 CO_2 share (in 2000) (percent)**
All global CO_2 emissions	30,689.5	4.8
Global transport GHG emissions	5,315.2	27.5
All global GHG emissions	36,727.9	4.0
Other Sources of U.S. CO_2	**2006**	**Share of U.S. CO_2 emissions (percent)**
Electricity Sector CO_2	2360.3	39.4
Industrial Sector CO_2	984.1	16.4

Arguably, based on these data, if the Administrator did not find that, for purposes of section 202, that CO_2 emissions from section 202 source categories contribute to the elevated combined level of GHG concentrations, it is unlikely that he would find that the other GHGs emitted by section 202 source categories contribute.

c. Methane Emissions From Section 202 Source Categories

Methane (CH_4) emissions from motor vehicles are a function of the CH_4 content of the motor fuel, the amount of

[109] The source of the emissions data is the *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006 (USEPA #430–R–08–005)* (hereinafter ''U.S. Inventory''). See the Emissions Technical Support Document for a discussion on the correspondence between Section 202 source categories and IPCC source categories. The most recent year for which official EPA estimates are available is 2006.

[110] Greenhouse gas emissions result from the use of HFCs in cooling systems designed for passenger comfort, as well as auxiliary systems for refrigeration.

[111] Detailed CO_2 emissions data from section 202 source categories are presented in the Emissions Technical Support Document. Other carbon compounds emitted such as CO, and non-methane volatile organic compounds oxidize in the atmosphere to form CO_2 in a period of hours to days.

[112] EPA typically uses current motor vehicle fleet emissions information when making a contribution analysis under section 202. We solicit comment on how or whether the reductions in CO_2 emissions expected by implementation of EISA, or any other projected change in emissions from factors such as growth in the fleet or vehicle miles traveled, would impact a contribution analysis for CO_2.

hydrocarbons passing uncombusted through the engine, and any post-combustion control of hydrocarbon emissions (such as catalytic converters). Methane emissions from these source categories decreased by 58% between 1990 and 2006, largely due to decreased CH_4 emissions from passenger cars and light-duty trucks.[113] Emissions of CH_4 from section 202 sources, and U.S. and global emissions are presented below in Table V–2.

TABLE V–2—SECTION 202 CH_4, U.S. AND GLOBAL EMISSIONS

U.S. Emissions	2006	Sec 202 CH_4 share (percent)
Section 202 CH_4	1.80	
All U.S. CH_4	555.3	0.32
U.S. emissions of Sec 202 GHG	1,665.40	0.11
All U.S. GHG emissions	7,054.20	0.03
Global Emissions	**2000**	**Sec 202 CH_4 share (in 2000) (percent)**
All global CH_4 emissions	5,854.90	0.05
Global transport GHG emissions	5,315.20	0.05
All global GHG emissions	36,727.90	0.01
Other Sources of U.S. CH_4	**2006**	**Share of U.S. CH_4 emissions (percent)**
Landfill CH_4 emissions	125.7	22.6
Natural Gas CH_4 emissions	102.4	18.4

EPA also notes that the EPA promotes the reduction of CH_4 and other non-CO_2 GHG emissions, as manifested in its domestic CH_4 partnership programs and the international Methane to Markets Partnership (launched in 2004), which are not focused on the transportation sector. EPA requests comment on how these and other efforts to encourage the voluntary reductions in even small amounts of GHG emissions are relevant to decisions about what level of ''contribution'' merits mandatory regulations.

d. Nitrous Oxide Emissions From Section 202 Source Categories

Nitrous oxide (N_2O) is a product of the reaction that occurs between nitrogen and oxygen during fuel combustion. N_2O (and nitrogen oxide (NO_X)) emissions from motor vehicles and motor vehicle engines are closely related to fuel characteristics, air-fuel mixes, combustion temperatures, and the use of pollution control equipment.

Nitrous oxide emissions from section 202 sources decreased by 27% between 1990 and 2006, largely due to decreased emissions from passenger cars and light-duty trucks.[114] Earlier generation control technologies initially resulted in higher N_2O emissions, causing a 24% increase in N_2O emissions from motor vehicles between 1990 and 1995. Improvements in later-generation emission control technologies have reduced N_2O output, resulting in a 41% decrease in N_2O emissions from 1995 to 2006. Emissions of N_2O from section 202 sources, and U.S. and global emissions are presented below in Table V–3.

TABLE V–3—SECTION 202 N_2O, U.S. AND GLOBAL EMISSIONS

U.S. Emissions	2006	Sec 202 N_2O share (percent)
Section 202 N_2O	29.5	
All U.S. N_2O	367.9	8.0
U.S. emissions of Sec 202 GHG	1665.4	1.8
All U.S. GHG emissions	7054.2	0.4
Global Emissions	**2000**	**Sec 202 N_2O share (in 2000) (percent)**
All global N_2O emissions	3,113.8	1.6
Global transport GHG emissions	5,315.2	0.9
All global GHG emissions	36,727.9	0.1

[113] Detailed methane emissions data for section 202 source categories are presented in the Emissions Technical Support Document.

[114] Detailed nitrous oxide emissions data for section 202 source categories are presented in the Emissions Technical Support Document.

Other Sources of U.S. N_2O	2006	Share of U.S. N_2O emissions (percent)
Agricultural Soil N_2O emissions	265.0	72.0
Nitric Acid N_2O emissions	15.6	4.3

Past experience has shown that substantial emissions reductions can be made by small N_2O sources. For example, the N_2O emissions from adipic acid production is smaller than that of Section 202 sources, and this sector reduced its emission by over 60 percent from 1990 to 2006 as a result of voluntary adoption of N_2O abatement technology by the three major U.S. adipic acid plants.[115]

e. Hydrofluorocarbons Emissions From Section 202 Source Categories

Hydrofluorocarbons (a term which encompasses a group of eleven related compounds) are progressively replacing CFCs and HCFCs in section 202 cooling and refrigeration systems as they are being phased out under the Montreal Protocol and Title VI of the CAA.[116]

Hydrofluorocarbons were not used in motor vehicles or refrigerated rail and marine transport in the U.S. in 1990, but by 2006 emissions had increased to 70 Tg CO_2e.[117] Emissions of HFC from section 202 sources, and U.S. and global emissions are presented below in Table V–4.

TABLE V–4—SECTION 202 HFC, U.S. AND GLOBAL EMISSIONS

U.S. Emissions	2006	Sec 202 HFC share (percent)
Section 202 HFC	69.5	
All U.S. HFC	124.5	55.8
U.S. emissions of Sec 202 GHG	1665.4	4.2
All U.S. GHG emissions	7054.2	1.0
Global Emissions	2000	Sec 202 HFC share (in 2000) (percent)
All global HFC emissions	259.2	20.3
Global transport GHG emissions	5,315.2	1.0
All global GHG emissions	36,727.9	0.1
Other Sources of U.S. HFC	2006	Share of U.S. HFC emissions (percent)
HCFC–22 Production	13.8	11.1
Other ODS Substitutes	41.2	33.1

EPA notes that section 202 HFC emissions are the largest source of HFC emissions in the United States, that these emissions increased by 274% from 1995 to 2006, and that section 202 sources are also the largest source of emissions of high GWP gases (i.e., HFCs, PFCs or SF_6) in the U.S. Thus, a decision not to set standards for HFCs under section 202 could be viewed as precedential with respect to the likelihood of future regulatory actions for any of these three gases.

f. Perfluorocarbons and Sulfur Hexafluoride

Perfluorocarbons (PFCs) and sulfur hexafluoride (SF_6) are not emitted from motor vehicles or motor vehicle engines in the United States.

g. Total GHG Emissions From Section 202 Source Categories

We note if ''air pollutant'' were defined as the collective group of four to six GHGs, the emissions of a single component (e.g., CO_2) could theoretically support a positive contribution finding. We also solicit comment on whether the fact that total GHG emissions from section 202 source categories are approximately 4.3% of total global GHG emissions would mean that adopting this definition of ''air pollutant'' would make it unnecessary to assess the individual GHG emissions levels less than that amount. Table V–5 below presents the contribution of individual GHGs to total GHG emissions from section 202 sources, and from all sources in the U.S.

TABLE V–5—CONTRIBUTION OF INDIVIDUAL GASES IN 2006 TO SECTION 202 AND U.S. TOTAL GHG

(In percent)

	CO_2	CH_4	N_2O	HFC	PFC	SF_6
Section 202	93.9	0.1	1.8	4.2		

[115] *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006 (USEPA #430–R–08–005),* p.2–22.

[116] 2006 IPCC Guidelines, Volume 3, Chapter 7. Page 43.

[117] Detailed HFC emissions data for section 202 source categories are presented in Tables in the Emissions Technical Support Document.

TABLE V–5—CONTRIBUTION OF INDIVIDUAL GASES IN 2006 TO SECTION 202 AND U.S. TOTAL GHG—Continued

(In percent)

	CO_2	CH_4	N_2O	HFC	PFC	SF_6
U.S. Total	84.8	7.9	5.2	1.8	0.1	0.2

Emissions of GHG from section 202 sources, and U.S. and global emissions are presented below in Table V–6.

TABLE V–6—SECTION 202 GHG, U.S. AND GLOBAL EMISSIONS

U.S. Emissions	2006	Sec 202 GHG share (percent)
Section 202 GHG	1665.4	
All U.S. GHG emissions	7054.2	23.6
Global Emissions	**2000**	**Sec 202 GHG share (in 2000) (percent)**
Global transport GHG emissions	5,315.2	29.5
All global GHG emissions	36,727.9	4.3
Other Sources of U.S. GHG	**2006**	**Share of U.S. GHG emissions (percent)**
Electricity Sector emissions	2377.8	33.7
Industrial Sector emissions	1371.5	19.4

h. Summary of Requests for Comment

EPA is seeking comment on the approach outlined above in the context of section 202 source categories, regarding how ''air pollutant'' should be defined, and contribution analyzed. Specifically, EPA is interested in comments regarding the data and comparisons underlying the above example contained in Emissions Technical Support Document. We also welcome comment on prior precedents for assessing contributions, as well as the potential precedential impact of a positive section 202 contribution findings for other potential sources of these and other GHGs. We also welcome comment on the relationship of these proposals to existing U.S. climate change emissions reduction programs and the magnitude of reductions sought under these programs.

VI. Mobile Source Authorities, Petitions, and Potential Regulation

A. Mobile Sources and Title II of the Clean Air Act

Title II of the CAA provides EPA's statutory authority for mobile source air pollution control. Mobile sources include cars and light trucks, heavy trucks and buses, nonroad recreational vehicles (such as dirt bikes and snowmobiles), farm and construction machines, lawn and garden equipment, marine engines, aircraft, and locomotives. The Title II program has led to the development and widespread commercialization of emission control technologies throughout the various categories of mobile sources. Overall, the new technologies sparked by EPA regulation over four decades have reduced the rate of emission of regulated pollutants from personal vehicles by 98% or more, and are key components of today's high-tech cars and SUVs. EPA's heavy-duty, nonroad, and transportation fuels regulatory programs have likewise promoted both pollution reduction and cost-effective technological innovation.

In this section, we consider how Title II authorities could be used to reduce GHG emissions from mobile sources and the fuels that power them. The existing mobile source emissions control program provides one possible model for how EPA could use Title II of the CAA to achieve long-term reductions in mobile source GHG emissions. The approach would be to set increasingly stringent performance standards that manufacturers would be required to meet over 10, 20 or 30 years using flexible compliance mechanisms like emissions averaging, trading and banking to increase the economic effectiveness of emission reductions over less flexible approaches. These performance standards would reflect EPA's evaluation of available and developing technologies, including the potential for technology innovation, that could provide sustained long-term GHG emissions reductions while allowing mobile sources to satisfy the full range of consumer and business needs.

Another approach we explore is the extent to which CAA authorities could be used to establish a cap-and-trade system for reducing mobile source-related GHG emissions that could provide even greater flexibility to manufacturers in finding least cost emission reductions available within the sector. With respect to cars and light trucks, we also present and discuss an alternative approach to standard-setting, focused on technology already in the market today in evaluating near term standards, that EPA began developing in 2007 as part of an inter-agency effort in response to the Massachusetts decision and the President's May 2007 directive. This approach took into consideration and used as a starting point the President's 20-in-10 goals for vehicle standards. Congress subsequently addressed many of the 20-in-10 goals through its action in passing EISA in December 2007.

EPA seeks public comment on how a Title II regulatory program could serve as an approach for addressing GHG emissions from mobile sources. In addition, EPA invites comments on the following specific questions:

• What are the implications for developing Title II programs in view of the global and long-lived nature of GHGs?

• What factors should be considered in developing a long-term, i.e, 2050, GHG emissions target for the transportation sector?

• Should the transportation sector make GHG emission reductions proportional to the sector's share of total U.S. GHG emissions or should other approaches be taken to determining the relative contribution of the transportation sector to GHG emission reductions?

• What are the merits and challenges of different regulatory timeframes such as 5 years, 10–15 years, 30–40 years?

• Should Title II GHG standards be based on environmental need, current projections of future technology feasibility, and/or current projections of future net societal benefits?

• Could Title II accommodate a mobile sources cap-and-trade program and/or could Title II regulations complement a broader cap-and-trade program?

• Should trading between mobile sources and sources in other sectors be allowed?

• Is it necessary or would it be helpful to have new legislation to complement Title II (such as legislation to provide incentives for the development and commercialization of low-GHG mobile source technologies)?

• How best can EPA fulfill its CAA obligations under Title II yet avoid inconsistency with NHTSA's regulatory approach under EPCA?

EPA also invites comments on whether there are specific limitations of a Title II program that would best be addressed by new legislation.

1. Clean Air Act Title II Authorities

In this section we review the Title II provisions that could be applied to GHG emissions from various categories of motor vehicles and fuels. For each provision, we describe the relevant category of mobile sources, the terms of any required ''endangerment'' finding, and the applicable standard-setting criteria. We also identify the full range of factors EPA may consider, including costs and safety, and discuss the extent to which standards may be technology-forcing.

a. CAA Section 202(a)

Section 202(a)(1) provides broad authority to regulate new ''motor vehicles,'' which are on-road vehicles. While other provisions of Title II address specific model years and emissions of motor vehicles, section 202(a)(1) provides the authority that EPA would use to regulate GHGs from new on-road vehicles. The ICTA petition sought motor vehicle GHG emission standards under this section of the Act.

As previously discussed, section 202(a)(1) makes a positive endangerment finding a prerequisite for setting emission standards for new motor vehicles. Any such standards ''shall be applicable to such vehicles * * * for their useful life.'' Emission standards under CAA section 202(a)(1) are technology-based, i.e. the levels chosen must be premised on a finding of technological feasibility. They may also be technology-forcing to the extent EPA finds that technological advances are achievable in the available lead time and that the reductions such advances would obtain are needed and appropriate. However, EPA also has the discretion to consider and weigh various additional factors, such as the cost of compliance (see section 202(a)(2)), lead time necessary for compliance (section 202(a)(2)), safety (see *NRDC* v. *EPA,* 655 F. 2d 318, 336 n. 31 (D.C. Cir. 1981)) and other impacts on consumers, and energy impacts. Also see *George E. Warren Corp.* v. *EPA,* 159 F.3d 616, 623–624 (D.C. Cir. 1998). CAA section 202(a)(1) does not specify the weight to apply to each factor, and EPA accordingly has significant discretion in choosing an appropriate balance among the factors. See EPA's interpretation of a similar provision, CAA section 231, at 70 FR 69664, 69676 (Nov. 17, 2005), upheld in *NACAA* v. *EPA,* 489 F.3d 1221, 1230 (2007).

b. CAA Section 213

CAA section 213 provides broad authority to regulate emissions of non-road vehicles and engines, which are a wide array of mobile sources including ocean-going vessels, locomotives, construction equipment, farm tractors, forklifts, harbor crafts, and lawn and garden equipment.

CAA section 213(a)(4) authorizes EPA to establish standards to control pollutants, other than NO_X, volatile organic compounds and CO, which are addressed in section 213(a)(3), if EPA determines that emissions from nonroad engines and vehicles as a whole contribute significantly to air pollution ''which may reasonably be anticipated to endanger public health or welfare''. Once this determination is made, CAA section 213(a)(4) provides that EPA ''may'' promulgate standards it deems ''appropriate'' for ''those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives or engines used in locomotives), which in the Administrator's judgment, cause or contribute to, such air pollution, taking into account costs, noise, safety, and energy factors associated with the application of available technology to those vehicles and engines.'' As with section 202(a)(1), this provision authorizes EPA to set technology-forcing standards to the extent appropriate considering all the relevant factors.

CAA section 213(a)(5) authorizes EPA to adopt standards for new locomotives and new locomotive engines. These standards must achieve the greatest degree of emissions reduction achievable through the application of available technology, giving appropriate consideration to the cost of applying such technology, lead time, noise, energy and safety. Section 213(a)(5) does not require that EPA review the contribution of locomotive emissions to air pollution which may reasonably be expected to endanger public health or welfare before setting emission standards, although in the past, EPA has provided such information in its rulemakings.

c. CAA Section 231

CAA section 231(a) provides broad authority for EPA to establish emission standards applicable to the ''emission of any air pollutant from any class or classes of aircraft engines, which in the Administrator's judgment, causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' *NACAA* v. *EPA,* 489 F.3d 1221, 1229 (D.C. Cir. 2007). As with sections 202(a) and 213(a)(4), this provision authorizes, but does not require, EPA to set technology-forcing standards to the extent appropriate considering all the relevant factors, including noise, safety, cost and necessary lead time for the development and application of requisite technology.

Unlike the motor vehicle and non-road programs, however, EPA does not directly enforce its standards regulating aircraft engine emissions. Under CAA section 232, the Federal Aviation Administration (FAA) is required to prescribe regulations to insure compliance with EPA's standards. Moreover, FAA has authority to regulate aviation fuels, under Federal Aviation

Act section 44714. However, under the Federal Aviation Act, the FAA prescribes standards for the composition or chemical or physical properties of an aircraft fuel or fuel additive to control or eliminate aircraft emissions the EPA ''decides under section 231 of the CAA endanger the public health or welfare[.]''

d. CAA Section 211

Section 211(c) authorizes regulation of vehicle fuels and fuel additives (excluding aircraft fuel) as appropriate to protect public health and welfare, and section 211(o) establishes requirements for the addition of renewable fuels to the nation's vehicle fuel supply.[118] In relevant parts, section 211(c) states that, ''[t]he Administrator may * * * by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle'' if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) which may reasonably be anticipated to endanger the public health or welfare, * * *'' Similar to other CAA mobile source provisions, section 211(c)(1) involves an endangerment finding that includes considering the contribution to air pollution made by the fuel or fuel additive.

The Energy Policy Act of 2005 also added section 211(o) to establish the volume-based Renewable Fuels Standard program. Section 211(o) was amended by the Energy Independence and Security Act of 2007.

Section VI.D of this notice provides more information and discussion about the CAA section 211 authorities.

2. EPA's Existing Mobile Source Emissions Control Program

In this notice, EPA is examining whether and how the regulatory mechanisms employed under Title II to reduce conventional emissions could also prove effective for reducing GHG emissions. Under Title II, mobile source standards are technology-based, taking such factors as cost and lead time into consideration. Various Title II provisions authorize or require EPA to set standards that are technology forcing, such as standards for certain pollutants for heavy-duty or nonroad engines.[119] Title II also provides for comprehensive regulation of mobile sources so that emissions of air pollutants from all categories of mobile sources may be addressed as needed to protect public health and the environment.

Pursuant to Title II, EPA has taken a comprehensive, integrated approach to mobile source emission control that has produced benefits well in excess of the costs of regulation. In developing the Title II program, the Agency's historic, initial focus was on personal vehicles since that category represented the largest source of mobile source emissions. Over time, EPA has established stringent emissions standards for large truck and other heavy-duty engines, nonroad engines, and marine and locomotive engines, as well. The Agency's initial focus on personal vehicles has resulted in significant control of emissions from these vehicles, and also led to technology transfer to the other mobile source categories that made possible the stringent standards for these other categories.

As a result of Title II requirements, new cars and SUVs sold today have emissions levels of hydrocarbons, oxides of nitrogen, and carbon monoxide that are 98–99% lower than new vehicles sold in the 1960s, on a per mile basis. Similarly, standards established for heavy-duty highway and nonroad sources require emissions rate reductions on the order of 90% or more for particulate matter and oxides of nitrogen. Overall ambient levels of automotive-related pollutants are lower now than in 1970, even as economic growth and vehicle miles traveled have nearly tripled. These programs have resulted in millions of tons of pollution reduction and major reductions in pollution-related deaths (estimated in the tens of thousands per year) and illnesses. The net societal benefits of the mobile source programs are large. In its annual reports on federal regulations, the Office of Management and Budget reports that many of EPA's mobile source emissions standards typically have projected benefit-to-cost ratios of 5:1 to 10:1 or more. Follow-up studies show that long-term compliance costs to the industry are typically lower than the cost projected by EPA at the time of regulation, which result in even more favorable real world benefit-to-cost ratios. Title II emission standards have also stimulated the development of a much broader set of advanced automotive technologies, such as on-board computers and fuel injection systems, which are at the core of today's automotive designs and have yielded not only lower emissions, but improved vehicle performance, reliability, and durability.

EPA requests comment on whether and how the approach it has taken under Title II could effectively be employed to reduce mobile source emissions of GHGs. In particular, EPA seeks comment and information on ways to use Title II authorities that would promote development and transfer of GHG control technologies for and among the various mobile source categories. The Agency is also interested in receiving information on the extent to which GHG-reducing technologies developed for the U.S. could usefully and profitably be exported around the world. Finally, EPA requests comments on how the Agency could implement its independent obligations under the CAA in a manner to avoid inconsistency with NHTSA CAFE rulemakings, in keeping with the Supreme Court's observation in the *Massachusetts* decision (''there is no reason to think the two agencies cannot both administer their obligations yet avoid inconsistencies'').

3. Mobile Sources and GHGs

The domestic transportation sector emits 28% of total U.S. GHG emissions based on the standard accounting methodology used by EPA in compiling the inventory of U.S. GHG emissions pursuant to the United Nations Framework Convention on Climate Change (Figure VI–1).

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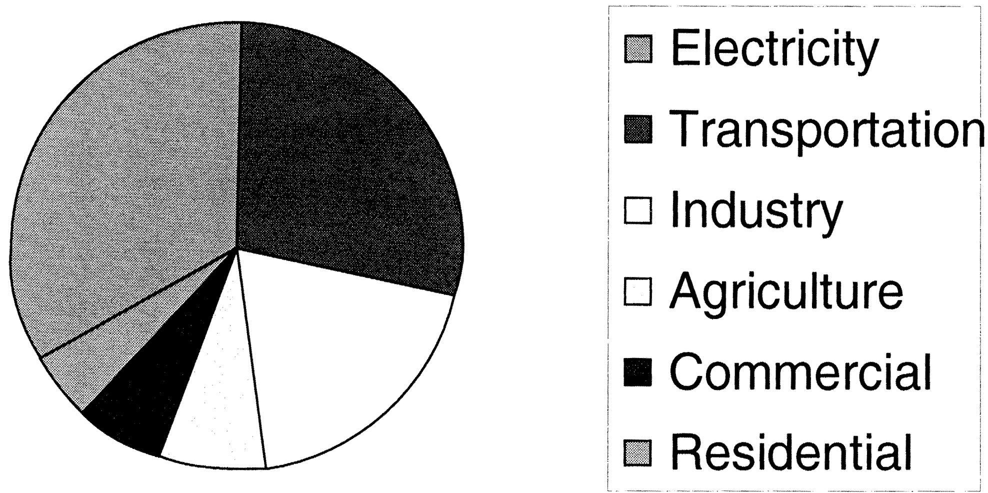
[118] EPA's authority to regulate fuels under CAA section 211 does not exend to aircraft engine fuel. Instead, under the Federal Aviatiion Act, the FAA prescribes standads for the compositiion or chemical or physical properties of an aircraft fuel or additive to control or eliminate aircraft emissions the EPA ''decides under section 231 of the Clean Air Act endanger the public health or welfare[.]'' 49 U.S.C. 44714.

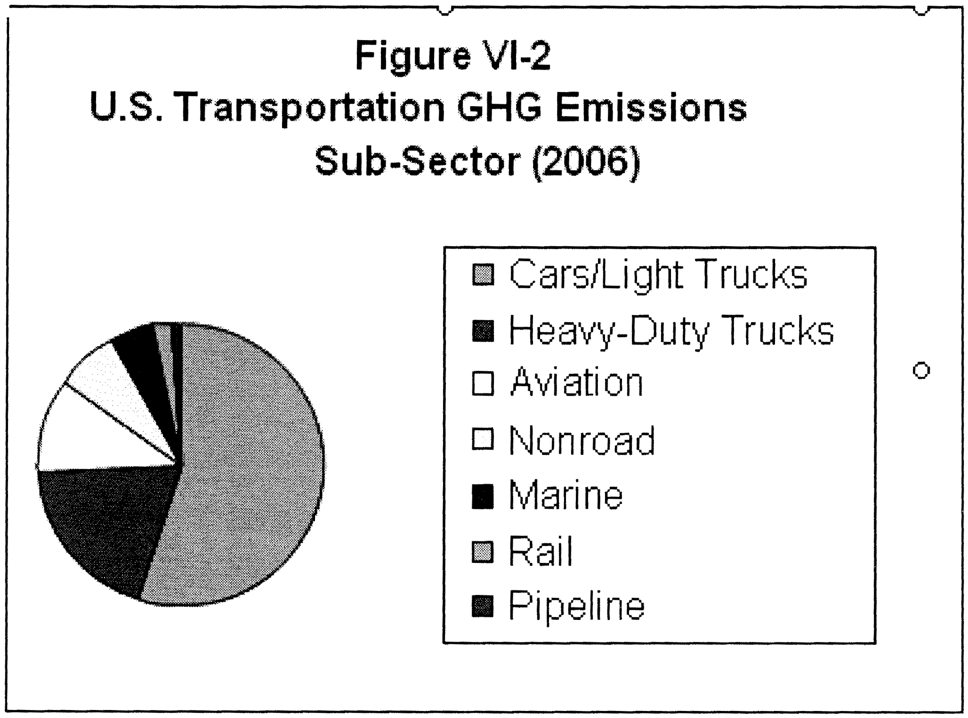
[119] Technology-forcing standards are based upon performance of technology that EPA determines will be available (considering technical feasibility, cost, safety, and other relevant factors) when the standard takes effect, as opposed to standards based upon technology which is already available. Technology-forcing standards further Congress' goal of having EPA project future advances in pollution control technology, rather than being limited by technology which already exists. *NRDC* v. *Thomas*, 805 F. 2d 410, 428 n. 30 (D.C. Cir. 1981). Technology-forcing standards are performance standards and do not require the development or use of a specific technology.

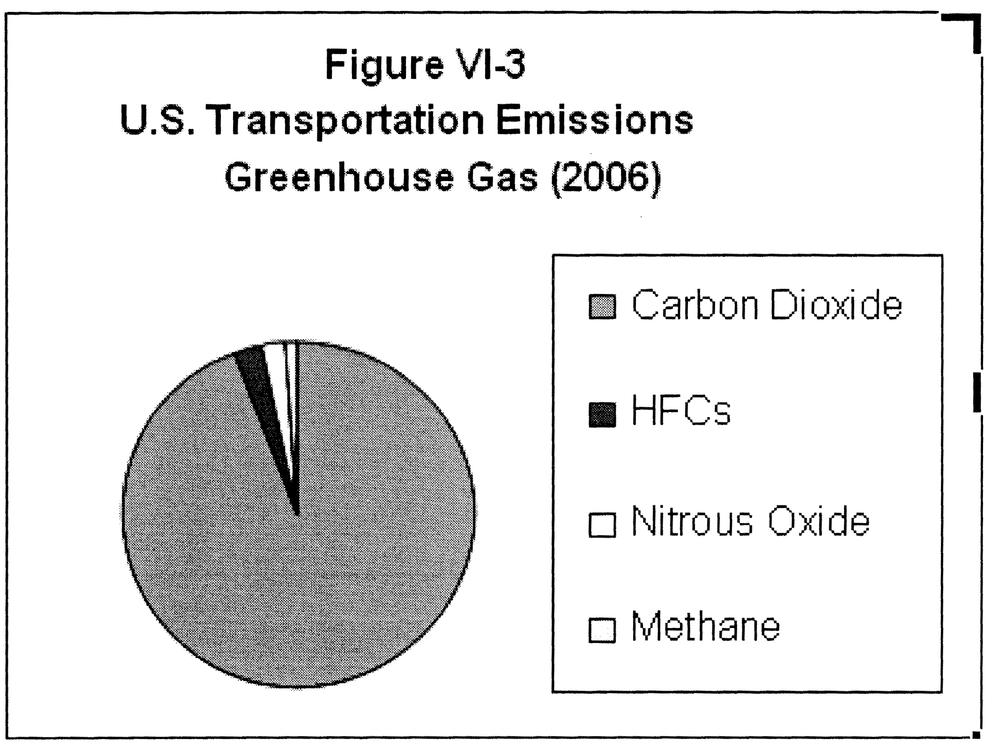
Figure VI-1
U.S. GHG Emissions Allocated to Economic Sectors (2006)



The only economic sector with higher GHG emissions is electricity generation which accounts for 34% of total U.S. GHG emissions. However, the inventory accounting methodology attributes to other sectors two sources of emissions that EPA has the authority to regulate under Title II of the CAA. First, the methodology includes upstream transportation fuel emissions (associated with extraction, shipping, refining, and distribution, some of which occur outside of the U.S.) in the emissions of the industry sector, not the transportation sector. However, reducing transportation fuel consumption would automatically and proportionally reduce upstream transportation fuel-related GHG emissions as well. Second, nonroad mobile sources (such as construction, farm, and lawn and garden equipment) are also included in the industry sector contribution. All of these emissions can be addressed under CAA Title II authority, at least with respect to domestic usage. Including these upstream transportation fuel (some of which occur outside of U.S. boundaries) and nonroad equipment GHG emissions in the mobile sources inventory would raise the contribution from mobile sources and the fuels utilized by mobile sources to approximately 36% of total U.S. GHG emissions. Since, based on 2004 data, the U.S. emits about 23% of global GHG emissions, under the traditional accounting methodology the U.S. transportation sector contributes about 6% of the total global inventory. If upstream transportation fuel emissions and nonroad equipment emissions are also included, U.S. mobile sources are responsible for about 8% of total global GHG emissions.

Personal vehicles (cars, sport utility vehicles, minivans, and smaller pickup trucks) emit 54% of total U.S. transportation sector GHG emissions (including nonroad mobile sources), with heavy-duty vehicles the second largest contributor at 18%, aviation at 11%, nonroad sources at 8%, marine at 5%, rail at 3%, and pipelines at 1% (Figure VI–2). CO_2 is responsible for about 95% of transportation GHG emissions, with air conditioner refrigerant HFCs accounting for 3%, vehicle tailpipe nitrous oxide emissions for 2%, and vehicle tailpipe methane emissions for less than 1% (Figure VI–3).





As noted previously, global climate change is a long-term problem. Climate experts such as the IPCC often use 2050 as a key reference point for future projections. Long-term projections of U.S. mobile source GHG emissions show that there is likely to be a major increase in transportation GHG emissions in the future.

Prior to the passage of EISA, U.S. transportation GHG emissions (including upstream fuel emissions) were projected to grow significantly, from about 2800 million metric tons in 2005 to about 4800 million metric tons in 2050 (see Figure VI–4, top curve). The fuel economy and renewable fuels provisions of EISA (Figure VI.A.2.–4, second curve from top) provide significant near-term mobile source GHG emissions reductions relative to the non-EISA baseline case. However, addressing climate change requires setting long-term goals. President Bush has proposed a new goal of stopping the growth of GHG emissions by 2025, and the IPCC has modeled several long-term climate mitigation targets for 2050.

Using Title II authority, mobile sources could achieve additional GHG emission reductions based on a variety of criteria including the amount of reduction needed, technological feasibility and cost effectiveness. While EISA's fuel economy and renewable fuel requirements will contribute to mobile source GHG emission reductions, its fuel economy standards affect only CO_2 emissions and do not apply to the full range of mobile source categories. EISA also specifies that fuel economy standards be set for no more than five years at a time, effectively limiting the extent to which those standards can take into account advancing technologies. Moreover, its renewable fuel provisions are limited in the extent to which they provide for GHG emission reductions, although EISA does mandate the use of renewable fuels that meet different lifecycle GHG emission reduction requirements.

Under Title II, EPA has broad authority to potentially address all GHGs from all categories of mobile sources. In addition, Title II does not restrict EPA to specific timeframes for action. If circumstances warrant, EPA could set longer term standards and promote technological advances by basing standards on the performance of technologies not yet available but which are projected to be available at the time the standard takes effect. Title II also provides authority to potentially require GHG emission reductions from transportation fuels. Consequently, the CAA authorizes EPA to consider what GHG emissions reductions might be available and appropriate to require from the mobile source sector, consistent with the Act.

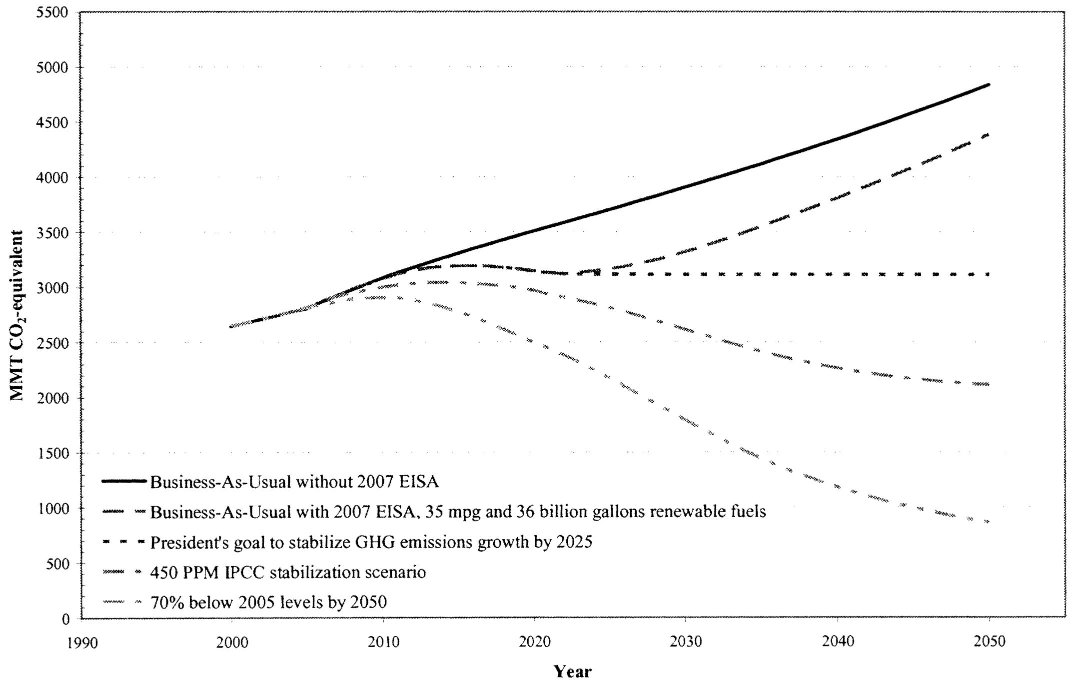
EPA has not determined what level of GHG emission reduction would be appropriate from the mobile source sector in the event a positive endangerment finding is made, although this ANPR includes some discussion of possible reductions. Any such determination is necessarily the province of future rulemaking activity. Without prejudging this important issue, and for illustrative purposes only, the final three curves in Figure VI–4 illustrate the additional reductions mobile sources would have to achieve if mobile sources were to make a proportional contribution to meeting the President's climate goal, the IPCC 450 CO_2 ppm stabilization scenario, and an economy-wide GHG emissions cap based on a 70% reduction in 2005 emissions by 2050.[120] As the figure illustrates, EISA provides about 25%, 15% and 10% of the transportation GHG emissions reductions that would be needed for mobile sources to make a proportional contribution to meeting the President's climate goal by 2050 (Figure VI–4, third curve), the IPCC 450 CO_2 ppm stabilization scenario in 2050 (Figure VI–4, fourth curve), and a 70% reduction in 2005 levels in 2050 (Figure VI–4, bottom curve), respectively.[121] These curves shed light on the possible additional role the transportation sector could play in achieving reductions, but do not address whether such reductions would be cost effective compared to other sectors. Title II regulation of GHG emissions could conceivably achieve greater emissions reductions so that mobile sources would make a larger contribution to meeting these targets. EPA requests comment on the usefulness of the information provided in Figure VI–4 and on approaches for determining what additional mobile source GHG emissions reductions would be appropriate. As described later in this section, our assessment of available and developing mobile source technologies for reducing GHG emissions indicates that mobile sources could feasibly achieve significant additional reductions.

[120] Prior to the passage of EISA, an EPA analysis projected that, absent additional regulatory approaches, transportation would provide about one-tenth of the GHG emission reductions that would be required to comply with an emissions cap based on a 70% reduction from 2005 levels in 2050, even though transportation is responsible for 28% of the official U.S. GHG emissions inventory.

[121] Calculation of the GHG emission reductions that EISA's fuel economy provisions will achieve include standards that result in an industry-wide fleet average fuel economy of 35 miles per gallon by 2020.

Figure VI-4

U.S. Transportation GHG Emissions Projections and Illustrative Targets Based on Proportional Reductions



4. Potential Approaches for Using Clean Air Act Title II To Reduce Mobile Source GHG Emissions

The regulatory approach and principles that guided development of our current mobile source emissions control program may prove useful in considering a possible mobile source GHG emissions control strategy under Title II of the CAA. As explained above, under Title II, EPA could potentially apply its historical approach for regulating traditional tailpipe emissions to long-term mobile source GHG emissions control, with the aim of providing strong incentives for technological innovation. The Agency invites public comment on the principles and underlying legal authority it has applied in the past and other possible principles for establishing GHG emissions standards under Title II, including—

• Coverage of all key vehicle, engine, and equipment sub-sectors in the entire transportation sector so that GHG emission standards are set not only for cars and light trucks, but for heavy-duty vehicles, non-road engines and equipment, including locomotive and marine engines, and aircraft as well. This broader regulatory coverage would provide more comprehensive mobile source GHG emissions reductions and market incentives to seek the most cost-effective solutions within the sector.

• Coverage of all GHGs emitted by the transportation sector by setting emissions standards that address every GHG for which the Agency makes the appropriate cause or contribute endangerment finding.

• Inclusion of transportation fuels in the program by considering vehicles and fuels as a system, rather than as isolated components.

• Addressing transportation fuels by setting GHG standards that account for the complete lifecycle of GHG emissions, including upstream GHG emissions associated with transportation fuel production.[122]

• Identifying long-term U.S. mobile source GHG emissions targets based on scientific assessments of environmental need, and basing the stringency of standards for individual mobile source sub-sectors on technology feasibility, cost and fuel savings, taking into account the relationship of mobile source reductions to reductions in other sectors under any economy-wide program.

• Allowing for staggered rulemakings for various sub-sectors and fuels, rather than regulating all mobile source entities at one time. EPA seeks comment on its CAA authority in this area, as well as on an approach to base the timing of the staggered rulemakings on factors such as the contribution of the mobile source sub-sector to the overall GHG emissions inventory and the lead time necessary for the commercialization of innovative technology.

• Use of Title II statutory authority to adopt technology-forcing standards, when appropriate, in conjunction with periodic reviews of technology and other key analytical inputs as a ‘‘reality check’’ to determine whether mid-course corrections in GHG emissions standards are needed.

• Use of our statutory authority to increase the rate of emissions reduction targets over time while allowing sufficient time for entrepreneurs and engineers to develop cost-effective technological solutions and minimize the risk of early retirement of capital investments.

• Establishment of a flexible compliance program that would allow averaging, banking and borrowing, and credit trading. Existing Title II programs generally allow credit trading only within individual mobile source sub-sector programs. EPA solicits comments on whether the global nature of climate

[122] EPA invites comment on how such an approach would interact with GHG regulations under other parts of the CAA or with a possible economy-wide approach.

change supports allowing credit trading between obligated parties across all mobile source sub-sectors and whether this would allow the sector as a whole to seek the lowest-cost solutions.

• Design of enforcement programs to ensure real world emissions reductions over the life of vehicles, engines, and equipment.

• Providing sufficient flexibility so that mobile source GHG emissions control programs can complement and harmonize with existing regulatory programs for certain pollutants.

In developing potential approaches to design of a Title II program, it is critical for EPA to understand the full ramifications of advanced technologies. Accordingly, EPA seeks public comment on potential GHG reducing technologies and their impacts, including availability, practicality, emissions reduction potential, cost, performance, reliability, and durability. EPA also seeks comment on how best to balance factors such as the need to send effective long-term signals that stimulate technology innovation, the imprecision of predictions of future technology innovation, and the importance of lead time to allow orderly investment cycles.

While advanced technology for reducing GHGs would likely increase the initial cost of vehicles and equipment to consumers and businesses, it would also increase efficiency and reduce fuel costs. In many cases, there is the potential for the efficiency advantages of low-GHG technologies to offset or more than offset the higher initial technology cost over the lifetime of the vehicle or equipment. EPA recognizes that not all consumers may understand or value changes to vehicles that reduce GHG emissions by increasing fuel efficiency, even though these changes lower fuel costs (see discussion in Section VI.C.2). One analytic issue that has policy implications is the most appropriate method for treating future consumer fuel savings when calculating cost effectiveness for a mobile sources GHG control strategy. Some analyses that consider the decisions made by automakers in isolation from the market and consumers exclude future fuel savings entirely. A second approach, used in models trying to predict future consumer behavior based on past experience, counts only those future fuel savings which consumers implicitly value in their new vehicle purchase decisions. A third method, reflecting a societal-wide accounting of benefits, includes all future fuel savings over vehicle lifetimes, whether overtly valued by new vehicle purchasers or not. EPA seeks comments on what could be done under Title II, or under any new legislation to complement Title II, to establish economic incentives that send long-term market signals to consumers and manufacturers that would help spark development of and investment in the necessary technology innovation.

An effective mobile source emissions compliance and enforcement program is fundamental to ensuring that the environmental benefits of the emission standards are achieved. We request comments on all aspects of the compliance approaches discussed in this notice and any other approaches to a compliance program for mobile source GHG emissions control. Topics to address could include, but are not limited to, methods for classifying, grouping and testing vehicles for certification, useful life and component durability demonstration, in-use testing, warranty and tampering, prohibited acts, and flexibilities for manufacturers.

Historically, EPA's programs to reduce criteria pollutants have typically included provisions to allow the generation, averaging, banking, and trading of emission credits within a vehicle or engine category. For example, there are averaging, banking, and trading (ABT) programs for light-duty vehicles, heavy-duty engines, and nonroad engines, among others. In these programs, manufacturers with vehicles or engines designed to over-comply with the standards can generate credits. These credits can then be used by that manufacturer or sold to other manufacturers in order to allow similar vehicles or engines with emissions above the standards to be certified and sold.

However, for a variety of reasons, we have in most cases not provided for trading of emission credits from one mobile source category to another. For example, credits generated in the light-duty vehicle program cannot be used for heavy-duty engines to comply, or credits generated for lawn and garden equipment cannot be used for larger gasoline engines to comply. These limitations are generally grounded in characteristics of required pollutants that do not necessarily apply in the case of GHG emissions. For instance, in the case of hydrocarbon emissions, because our programs are meant, in part, to reduce the pollutant in areas where it most contributes to ozone formation, we have not allowed farm tractors in rural areas to generate credits that would allow urban passenger cars to be sold with little or no emission control. Similarly, for problems like carbon monoxide ''hot spots'' or direct, personal exposure to diesel PM, it has been important to ensure a certain minimum degree of control from each vehicle or engine, rather than allowing the very localized benefits to be ''traded away.''

Given the global nature of the major GHGs, we request comment on whether new provisions could be used to allow broad trading of CO_2-equivalent emission credits among the full range of mobile sources, and if so, how they could be designed, including highway and nonroad vehicles and engines as well as mobile source fuels.

EPA has also considered the potential of GHG emissions leakage to other domestic economic sectors, or to other countries, should EPA adopt Title II standards for motor vehicle GHG emissions and GHG emissions from transportation fuels. As discussed in more detail later in this section, there are transportation fuels (such as grid electricity) that do not result in tailpipe GHG emissions, but that do result in GHG emissions when the fuel is produced. Greater use of such fuels in transportation would reduce GHG emissions covered by Title II, but would increase GHG emissions covered by Title I, requiring coordination among the CAA programs to ensure the desired level of overall GHG control. In addition, GHG emissions from potential land use changes caused by transportation fuel changes could cause GHG emissions leakage unless accounted for in any transportation fuels GHG program. Finally, since transportation fuels can be fungible commodities, if other countries do not adopt similar GHG control programs, it is possible that lower-lifecycle GHG fuels will be concentrated in the U.S. market, while higher-lifecycle GHG fuels will be concentrated in unregulated markets. For example, sugar cane-based ethanol, if it were determined to have more favorable upstream GHG emissions, could shift from the Brazilian to the U.S. market, and corn-based ethanol, if it were determined to have less favorable upstream GHG emissions, could shift from the U.S. to the Brazilian market. This shifting could ease compliance with U.S. transportation fuel GHG regulations, but could actually increase global GHG emissions due to the GHG emissions that would result from transporting both types of ethanol fuels over greater distances. EPA seeks comments on all possible GHG emissions leakage issues associated with mobile source GHG regulation, and in particular on whether the theoretical concern with fungible transportation fuels is likely to be realized.

While the preceding discussion has focused on using the existing CAA Title

II model for regulating mobile source GHG emissions, there are other alternative regulatory approaches on which EPA invites comments. In particular, long-term mobile source GHG emissions reductions from vehicles and equipment might be achieved by establishing GHG emissions caps on vehicle, engine, and/or equipment manufacturers to the extent authorized by the CAA. EPA's existing regulatory program uses performance standards that are rate-based, meaning that they require manufacturers to meet a certain gram/mile average for their fleet, as in the Tier 2 light-duty vehicle program. Manufacturers produce vehicles with varying rates of emissions performance, and through averaging, banking, and trading demonstrate compliance with this performance standard on a sales-weighted average basis. While a manufacturer must take its fleet mix of higher-emitting and lower-emitting models into account in demonstrating compliance, the sales-weighted average is independent of overall sales as long as the fleet mix does not change. As a result, a manufacturer's fleet may emit more or less total pollution depending on its total sales, so long as the sales-weighted average emissions of its vehicles do not exceed the standard.

In a cap-and-trade program, the standard set by EPA would not be an average, sales-weighted rate of emissions, but rather a cap on overall emissions from a manufacturer's production. Under such a program, the emissions attributable to a manufacturer's fleet could not grow with sales unless the manufacturer obtained (e.g., through trading) additional allowances to cover higher emissions. Presumably, EPA could assign a VMT or usage value to be used by manufacturers, and manufacturers would demonstrate compliance by combining the rate of performance of their vehicles, their sales volume, and the assigned VMT or usage value to determine overall emissions.

EPA could set standards under an emissions cap-and-trade program by assessing the same kind of factors as we have in the past: Availability and effectiveness of technology, cost, safety, energy factors, etc. Setting an appropriate emissions cap would be more complex, and EPA would need to demonstrate that the cap is appropriate, given that changes in sales levels (both industry-wide and for individual manufacturers) must be accounted for in the standard-setting process. An emissions cap approach also raises difficult issues of how allowable emissions under the cap would be allocated among the manufacturers, including new entrants.

EPA invites comment on all issues involving this emissions cap-and-trade approach, including comment on relevant technical and policy issues, and on EPA's authority to adopt such an approach under Title II.

A third possible model for regulating mobile source GHG emissions would combine elements of these approaches. This type of hybrid approach would include, as one element, either rate-based GHG emissions performance standards similar to the existing mobile source program for conventional pollutants or GHG emissions caps for key vehicle, engine, and/or equipment manufacturers, both of which would be promulgated under Title II of the CAA. The second element of this hybrid approach would be an upstream emissions cap on fuel refiners for all life-cycle GHG emissions associated with transportation fuels, including both upstream fuel production GHG emissions and downstream vehicle GHG emissions, to the extent authorized under the CAA or future climate change legislation. For a discussion of issues associated with including direct mobile source obligations in combination with an economy-wide approach, see section III.F.3.

An important interrelationship between stationary sources and mobile sources would develop if grid electricity becomes a more prevalent transportation fuel in the future. There is considerable interest, both by consumers and automakers, in the possible development and commercialization of plug-in hybrid electric vehicles (PHEVs) that would use electricity from the grid as one of two sources of energy for vehicle propulsion. Use of grid electricity would yield zero vehicle tailpipe GHG emissions, providing automakers with a major incentive to consider PHEVs, which may be appropriate given that vehicle cost is the single biggest market barrier to PHEV commercialization. But it would also result in a net increase in demand for electricity, which could add to the challenge of reducing GHG emissions from the power sector. Any evaluation of the overall merits of using grid electricity as a transportation fuel could not be done in isolation, but would require a coordinated assessment and approach involving both mobile sources under CAA Title II and stationary sources under CAA Title I. Linking efforts under Titles I and II would allow for needed coordination regarding any type of future transportation fuel that would have zero vehicle tailpipe GHG emissions but significant fuel production GHG emissions.

EPA seeks comment on all aspects, including the advantages and disadvantages, of using Title II regulations to complement an economy-wide cap-and-trade GHG emissions program.

EPA also seeks public comment on the available authority for, and the merits of, allowing credit trading between mobile sources and non-mobile source sectors. One of the potential limitations of allowing credit trading only within the transportation sector is that it would not permit firms to take advantage of emission reduction opportunities available elsewhere in the economy. In particular, EPA requests comment on the advantages and disadvantages of allowing trading across sectors, and how to ensure that credit trading would have environmental integrity and that credits are real and permanent.

Finally, EPA seeks public comment on two remaining issues: (1) How a CAA Title II mobile source GHG emissions control program and NHTSA's corporate average fuel economy program for cars and light-duty trucks could best be coordinated; and (2) whether and how Title II, or other provisions in the CAA, could be used to promote lower vehicle miles traveled and equipment activity.

B. On-Highway Mobile Sources

1. Passenger Cars and Light-Duty Trucks

In this section, we discuss and request comment on several potential approaches for establishing light-duty vehicle GHG emission standards under section 202(a)(1). These approaches build off of, to varying extents, the analysis EPA undertook during 2007 to support the development of a near-term control program for GHG emissions for passenger cars and light duty trucks under the authorities of Title II of the CAA.

We begin this section with a discussion of one potential approach for establishing GHG standards under section 202(a) of the CAA that reflects EPA's historical approach used for traditional pollutants, including the principles EPA has used in the past under Title II. This approach focuses on long-term standard setting based on the technology-forcing authority provided under Title II. Next we present and discuss the results of alternative approaches to standard-setting which EPA considered during 2007 in the work performed under EO 13432. This alternative approach is based on setting near-term standards based primarily on technology already in the market today.

This is followed by a discussion of the wide range of technologies available today and technologies that we project will be available in the future to reduce GHG emissions from light-duty vehicles. We next include a discussion of a potential approach to reduce HFC, methane, N_2O, and vehicle air conditioning-related CO_2 emissions. We conclude with a discussion of the key implementation issues EPA has considered for the development of a potential light-duty vehicle GHG control program.

Our work to date indicates that there are significant reductions of GHG emissions that could be achieved for passenger cars and light-duty trucks up to 2020 and beyond that would result in large net monetized benefits to society. For example, taking into account specific vehicle technologies that are likely to be available in that time period and other factors relevant to motor vehicle standard-setting under the CAA, EPA's analysis suggests that substantial reductions can occur where the cost-per-ton of GHG reduced is more than offset by the value of fuel savings, and the net present value to society could be on the order of $340 to $830 billion without considering benefits of GHG reductions (see section VI.B.1.b).[123]

a. Traditional Approach to Setting Light-Duty Vehicle GHG Standards

In this section we discuss and request comment on employing EPA's traditional approach to setting mobile source emissions standards to develop standards aimed at ensuring continued, long-term, technology-based GHG reductions from light-duty vehicles, in light of the unique properties of GHG emissions. We also request comment on how EPA could otherwise use its CAA Title II authorities to provide incentives to the market to accelerate the development and introduction of ultra clean, low GHG emissions technologies.

Based on our work to date, we expect that such an approach could result in standards for the 2020 to 2025 time frame that reflect a majority of the new light-duty fleet achieving emission reductions based on what could be accomplished by many of the most advanced technologies we know of today (e.g., hybrids, diesels, plug-in hybrid vehicles, full electric vehicles, and fuel cell vehicles, all with significant use of light-weight materials). Our analysis (presented in section VI.B.1.b) indicates that standards below 250 g/mile CO_2 (above 35 mpg) could be achievable in this time frame, and the net benefit to society could be in excess of $800 billion. These estimates, however, do not account for future CAFE standards that will be established under EISA.

EPA's historical approach for setting air pollutant standards for mobile sources has been to assess the capabilities of pollution control technologies, including advanced control technologies; whether reductions associated with these technologies are feasible considering cost, safety, energy, and other relevant factors; and the benefits of these controls in light of overall public health and environmental goals. Public health and environmental goals provide the important context in which this technology-driven process occurs. In many cases in the past, the goals have involved the need for emissions reductions to attain and maintain NAAQS.

As mentioned previously, EPA has utilized the CAA to establish mobile source programs which apply progressively more stringent standards over many years, often with substantial lead time to maximize the potential for technology innovation, and where appropriate, we have included technology reviews along the way to allow for ''mid-course corrections,'' if needed. We have also provided incentives for manufacturers to develop and introduce low emission technologies more quickly than required by the standards. For example, in our most recent highway heavy-duty engine standards for PM and NO_X, we established technology-forcing standards via a rulemaking completed in 2000 which provided six years of lead-time for the start of the program and nearly ten years of lead-time for the completion of the phase-in of the standards. In addition, EPA performed periodic technology reviews to ensure industry was on target to comply with the new standards, and these reviews allowed EPA to adjust the program if necessary. This same program provided early incentive emission credits for manufacturers who introduced products complying with the standards well in advance of the program requirements.

Consistent with the CAA and with our existing mobile source programs, we request comment on using the following traditional principles for development of long-term GHG standards for light-duty vehicles: Technology-forcing standards, sufficient lead-time (including phase-in of standards reflecting use of more advanced technologies), continual improvements in the rate of emissions reduction, appropriate consideration of the costs and benefits of new standards, and the use of flexible mechanisms such as banking and credit trading (between sources within or outside of this sector). EPA's goal would be to determine the appropriate level of GHG emission standards to require by an appropriate point in the future. We would establish the future time frame in light of the needs of the program. EPA would evaluate a broad range of technologies in order to determine what is feasible and appropriate in the time frame chosen, when considering the fleet as a whole. EPA would analyze the costs and reductions associated with the technologies, and compare those to the benefits from and the need for such reductions. We would determine what reductions are appropriate to require in that time frame, assuming industry started now, and then determine what appropriate interim standards should be set to most effectively move to this long-term result.

In developing long-term standards, we would consider known and projected technologies which in some cases are in the market in limited production or which may not yet be in the market but which we project can be, provided sufficient lead-time. We would consider how broadly and how rapidly specific technologies could be applied across the industry. If appropriate, EPA could include technology reviews during the implementation of new standards to review the industry's progress and to make adjustments as necessary. EPA would evaluate the amount of lead-time necessary and if appropriate the phase-in period for long-term standards. To the extent that future standards may result in significant increases in advanced technologies such as plug-in electric hybrid or full electric vehicles, we would consider how a Title II program might interact with a potential Title I program to ensure that reductions in GHG emissions due to a decrease in gasoline consumption are not off-set by increases in GHG emissions from the electric utility sector. We would also consider the need for flexibilities and incentives to promote technology innovation and provide incentives for advanced technologies to be developed and brought to the market. We would consider the need for orderly manufacturer production planning to ensure that capital investments are wisely used and not stranded. Finally, EPA would evaluate the near and long-term costs and benefits of future standards in order to ensure the appropriate relationship between benefits and costs, e.g. ensuring that

[123] These estimates do not account for the future CAFE standards that will be established under EISA.

benefits of any future standards exceed the costs. This could lead to standard phase-in schedules significantly different from the two approaches contained in our Light-duty Vehicle Technical Support Document analysis (available in the docket for this advance notice); which under one approach was the same incremental increase in stringency each year (the 4% per year approach), and for the second approach lead to large increases in stringency the first several years followed by small changes in the later years (the model-optimized approach).

One critical element in this approach is the time frame over which we should consider new GHG standards for light-duty vehicles. We request comment on the advantages and disadvantages of establishing standards for the 2020 or 2025 time frame, which is roughly consistent with EPA's traditional approach to setting standards while allowing a sufficient time period for investment and technological change, and even longer. There are two major factors which may support a long-term approach. First, addressing climate change will require on-going reductions from the transportation sector for the foreseeable future. Thus, establishing short-term goals will not provide the long-term road map which the environmental problem requires. Second, providing a long-term road map could have substantial benefits for the private sector. The automotive industry itself is very capital intensive—the costs for developing and producing a major vehicle model is on the order of several billion dollars. A manufacturer making a major investment to build a new engine, transmission or vehicle production plant expects to continue to use such a facility without major additional investments for at least 15 years, if not more. A regulatory approach which provides a long-term road map could allow the automotive industry to plan their future investments in an orderly manner and minimize the potential for stranded capital investment, thus helping to ensure the most efficient use of societal resources. A long-term regulatory program could also provide industry with the regulatory certainty necessary to stimulate technology development, and help ensure that the billions of dollars invested in technology research and development are focused on long-term needs, rather than on short-term targets alone.

There could also be disadvantages to establishing long-term standards. For example, uncertainties in the original analysis underlying the long-term standards could result in overly conservative or optimistic assumptions about emission reductions could and should be accomplished. Long-terms standards could also reduce flexibility to respond to more immediate market changes or other unforeseen events. EPA has tools, such as technology reviews, that could help reduce these risks of long-term standards. We request comment on the advantages and disadvantages of a long-term approach to standard-setting, and any issues it might raise for integration with an economy-wide approach to emission reductions.

More generally, EPA requests comment on the issues discussed in this section, and specifically the appropriateness of a light-duty vehicle GHG regulatory approach in which EPA would identify long-term emissions targets (e.g., the 2020–2025 time frame or longer) based on scientific assessments of environmental need, and developing standards based on a technology-forcing approach with appropriate consideration for lead-time, costs and societal benefits.

b. 2007 Approach to Setting Light-Duty Vehicle Emission Standards

i. CAA and EPCA Authority; Passage of EISA

As indicated above in section VI.A.2, CAA section 202(a) provides broad authority to regulate light-duty vehicles. Standards which EPA promulgates under this authority are technology-based and applicable for the useful life of a vehicle. EPA has discretion to consider and weigh various additional factors, including the cost of compliance, safety and other impacts on consumers, and energy impacts.

NHTSA authority to set CAFE standards derives from the Energy Policy and Conservation Act (42 U.S.C. section 6201 *et seq.*) as amended by EISA. This statutory authority, enacted in December 2007, directs NHTSA to consider four factors in determining maximum feasible fuel economy standards—technological feasibility, economic practicability, the effect of other standards issued by the government on fuel economy, and the need of the nation to conserve energy. NHTSA may also take into account other relevant considerations such as safety.

EISA amends NHTSA's fuel economy standard-setting authority in several ways. Specifically it replaces the statutory default standard of 27.5 miles per gallon for passenger cars with a mandate to establish separate passenger cars and light truck standards annually beginning in model year 2011 to reflect the maximum feasible level. It also requires that standards for model years 2011–2020 be set sufficiently high to ensure that the average fuel economy of the combined industry-wide fleet of all new passenger cars and light trucks sold in the U.S. during MY 2020 is at least 35 miles per gallon. In addition, EISA provides that fuel economy standards for no more than five model years be established in a single rulemaking, and mandated the reform of CAFE standards for passenger cars by requiring that all CAFE standards be based on one or more vehicle attributes, among other changes.[124] EISA also directs NHTSA to consult with EPA and the Department of Energy on its new CAFE regulations.

Pursuant to EISA's amendments to EPCA, NHTSA recently issued a notice of proposed rulemaking for new, more stringent CAFE standards for model years 2011–2015 for both passenger cars and light-duty trucks. 73 FR 24352 (May 2, 2008).

Prior to EISA's enactment, EPA and NHTSA had coordinated under EO 13432 on the development of CAA rules that would achieve large GHG emission reductions and CAFE rules that would achieve large improvements in fuel economy. As discussed later in this section, there are important differences in the two agencies' relevant statutory authorities. EPA nevertheless believes that it is important that any future GHG regulations under CAA Title II and future fuel economy regulations under NHTSA's statutory authority be designed to ensure that an automaker's actions to comply with CAA standards not interfere with or impede actions taken for meeting fuel economy standards and vice versa. The goals of oil savings and GHG emissions reductions are often closely correlated, but they are not the same. As the Supreme Court pointed out in its *Massachusetts* decision, "[EPA's] statutory obligation is wholly independent of DOT's mandate to promote energy efficiency", and "[t]he two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." It is thus important for EPA and NHTSA to maximize coordination between their programs so that both the appropriate degree of GHG emissions reductions and oil savings are cost-effectively achieved, given the agencies' respective statutory authorities. EPA asks for comment on how EPA's and NHTSA's respective statutory authorities can best be

[124] For a full discussion of EISA requirements and NHTSA interpretation of its statutory authority please see 73 FR 24352 (May 2, 2008).

coordinated under all of the alternatives presented in this section so that inconsistency can be avoided.

ii. 2007 Approach

In this section, we present an overview of two alternative approaches for setting potential light-duty vehicle GHG standards based on our work during 2007 under EO 13432. As noted previously, in response to *Massachusetts* v. *EPA* and as required by EO 13432, prior to EISA's passage, we coordinated with NHTSA and the Department of Energy in developing approaches and options for a comprehensive near-term program under the CAA to reduce GHG emissions from cars and light-duty trucks.[125] Results from this effort are discussed below and in a Technical Support Document, ''Evaluating Potential GHG Reduction Programs for Light Vehicles'' (referred to as the ''Light-duty Vehicle TSD'' in the remainder of this notice).

The Light-duty Vehicle TSD represents EPA's assessment during 2007 of how a light-duty vehicle program for GHG emissions reduction under the CAA might be designed and implemented in keeping with program parameters (e.g., time frame, program structure, and analytical tools) developed with NHTSA prior to enactment of EISA. In addition, the Light-duty Vehicle TSD assesses the magnitude of the contribution of light-duty vehicles to U.S. GHG emissions. It also addresses both tailpipe CO_2 emissions as measured by EPA tests used for purposes of determining compliance with CAFE standards, and control of other vehicular GHG emissions. These other emissions are not accounted for if the regulatory focus is solely on CO_2, and involve greenhouse gases that have higher global warming potentials than CO_2. These emissions, as well as air-conditioning-related CO_2, are not measured by the existing EPA test procedure for determining compliance with CAFE standards, so that there is no overlap with control of these emissions and CAFE standards if these emissions are controlled under the CAA. As described in the section VI.B.1.d of this advance notice, these emissions account for 10 percent of light-duty vehicle GHG emissions on a CO_2 equivalent basis. They include emissions of CO_2 from air conditioning use and emissions of HFCs from air conditioning system leaks. Technologies exist which can reduce these emissions on the order of 40 to 75% (for air conditioning efficiency improvements and HFC leakage control, respectively), at an initial cost to the consumer of less than $110. This initial cost would be more than offset by the reduced maintenance and fuel savings due to the new technology over the life of the vehicle. We also considered standards which would prevent future increases in N_2O and methane.

Based on our work in 2007 pursuant to Executive Order 13432, EPA developed two different analytical approaches which could be pursued under the CAA for establishing light-duty vehicle CO_2 standards. Both are attribute-based approaches, using vehicle footprint (correlating roughly to vehicle size) as the attribute. Under either approach, a CO_2-footprint continuous function curve is defined that establishes different CO_2 emission targets for each unique vehicle footprint. In general, the larger the vehicle footprint, the higher (less stringent) the corresponding vehicle CO_2 emission target will be. Each manufacturer would have a different overall fleet average CO_2 emissions standard depending on the distribution of footprint values for the vehicles it sells. See Section VI.B.1.d and the Light-duty Vehicle TSD of this Advance Notice for additional discussion of attribute-based standards and other approaches (e.g., a non-attribute, or universal standard).

One approach was based on a fixed percentage reduction per year in CO_2 emissions. We examined a 4% per year reduction in CO_2 emissions, reflecting the projected reductions envisioned by the President in his 20-in-10 plan in the 2007 State of the Union address and subsequent legislative proposals . The other approach identified CO_2 standards which an engineering optimization model projects as resulting in maximum net benefits for society (hereafter referred to as the ''model-optimized'' approach). That approach uses a computer model developed by the Department of Transportation Volpe Center called the CAFE Effects and Compliance Model (the ''Volpe Model''). The Volpe Model was designed by DOT as an analytical tool which could evaluate potential changes in the stringency and structure of the CAFE program, and was first used in DOT's 2006 rulemaking establishing CAFE standards for model years 2008–2011 light-trucks.[126] [127]

Using the fixed percentage reduction approach, projections regarding technology feasibility, technology effectiveness, and lead-time are critical as these are the most important factors in determining whether and how the emission reductions required by a future standard would be achieved. When using the model-optimized approach, a larger set of inputs are critical, as each of these inputs can have a significant impact in the model's projections as to the future standard. These inputs include technology costs and effectiveness, lead-time, appropriate discount rates, future fuel prices, and the valuation of a number of externalities (e.g., criteria air pollution improvements, GHG emission reductions, and energy security). Although all of these factors are relevant under either approach, there are major differences in the way this information is used in each approach to develop and evaluate appropriate standards.

EPA believes both of these approaches for establishing fleet-wide average CO_2 emissions standards are permissible, conceptually, under section 202(a) of the Act. Section 202(a)(2) requires EPA to give consideration to ''the cost of compliance'' for use of the technology projected to be used to achieve the standards (''requisite technology''). The model-optimized approach can be used in appropriate circumstances to satisfy this requirement.[128] The fixed percent per year approach is broadly consistent with EPA's traditional means of setting standards for mobile sources, which identifies levels of emissions reductions that are technologically feasible at reasonable cost with marginal emissions reduction benefits which may far outweigh marginal program costs, without adverse impacts on safety and with positive impacts on energy utilization, and which address a societal need for reductions.[129] Comparing and contrasting these approaches with the model-optimized approach is one way to evaluate options for appropriate standards under section 202(a). We request comment on these approaches and whether one or the other is a more appropriate method for EPA to consider future light-duty GHG standards under section 202 of the CAA. We also request comment on other potential approaches

[125] E.O. 13432 called on the agencies to, ''undertake such regulatory action, to the maximum extent permitted by law and determined by the head of the agency to be practicable, jointly with other agencies.''

[126] See 66 FR 17566—Average Fuel Economy Standards for Light Trucks Model Years 2008–2011.

[127] See ''CAFE Compliance and Effects Modeling System Documentation, Draft, 1/26/07'' published by DOT, a copy of which is available in the docket for this Advanced Notice.

[128] See *Husqvarna AB* v. *EPA*, 254 F. 3d 195, 200 (D.C. Cir. 2001) (EPA reasonably chose not to use marginal cost-benefit analysis to analyze standards [under the technology-forcing section 213 of the Act], where section 213 does not mandate a specific method of cost analysis).

[129] See *NRDC* v. *EPA*, 655 F. 2d 318, 332–334 (D.C. Cir. 1981).

EPA should consider, including the approach described in section VI.B.1.a.

During 2007, EPA, DOT's Volpe Center, and NHTSA expended a major technical effort to make a series of significant enhancements to the Volpe Model by reviewing and updating, where possible, many of the critical inputs to the Model (e.g., cost reduction learning curves, the number and estimated costs and effectiveness of potential CO_2/mpg control technologies), as well as making updates to the Model itself. This technical work notably improved the Volpe Model. However, the Volpe Model was designed specifically to analyze potential changes to NHTSA's CAFE program, and there remained several aspects of the analysis we conducted that did not reflect differences between EPA and NHTSA statutory authorities, and we were not able to address these aspects in 2007. As a result, our analysis tended to underestimate the benefits and/or overestimate the costs of light-duty vehicle CO_2 standards that could be established under the CAA. We discuss these issues below.

First, past NHTSA CAFE regulatory actions have generally had a short-term focus (a 3–5 year timeframe), and NHTSA is currently proposing more stringent CAFE standards for five model years, 2011–2015, in keeping with its revised statutory authority, as discussed above. In contrast, EPA's Title II authority permits EPA to set standards over a significantly longer period of time as appropriate in light of environmental goals, developing technologies, costs, and other factors. A short-term focus can have a significant implication for the technology assumptions which go into a standard-setting analysis.

In our 2007 analysis, we assumed limited technology innovation beyond what is known today, and did not include several commercially available or promising technologies such as advanced lightweight materials for all vehicle classes (several auto companies have recently announced plans for large future reductions in vehicle weight), plug-in hybrids, optimized ethanol vehicles, and electric vehicles. To the extent such innovations penetrate the market over the next 10 years, the societal benefits and/or decreased societal cost of CO_2 standards will be greater than what we projected. A short-term focus may yield a more reliable short-term projection because it relies on available technology and is less prone to uncertainties involved in projecting technological developments and other variables over a longer term. The trade-off is that such a focus may not stimulate the development of advanced, low GHG-emitting technologies. For the auto industry, significant technological advances have historically required many years and large amounts of capital.

Second, our 2007 analysis does not account for a series of flexibilities that EPA may employ under the CAA to reduce compliance costs, such as multi-year strategic planning, and credit trading and banking. As mentioned previously, EPA has used many of these flexibilities in its existing mobile source programs, and we would attempt to include such flexibilities in any future EPA GHG standards analysis.

Third, under the CAA manufacturers traditionally choose to comply instead of non-comply, since they cannot sell new vehicles unless they receive a certificate of conformity from EPA that is based on a demonstration of compliance. Under the penalty provisions of the CAA, light-duty vehicle manufacturers may not pay a civil penalty or a fine for non-compliance with the standards and still introduce their vehicles into commerce. In our 2007 analysis, we assumed a number of manufacturers would pay fees rather than comply with the analyzed standards. This assumption resulted in a lower compliance cost estimation and lower GHG benefits.

Fourth, in our 2007 analysis, we did not reflect the difference in carbon content between gasoline and diesel fuel. This difference has not been germane to NHTSA's setting of CAFE standards, but it is important to the GHG emissions reductions that different standards can achieve. Therefore, our Light-duty Vehicle TSD analysis did not account for the higher CO_2 emissions which result from the use of a gallon of diesel fuel compared to a gallon of gasoline (diesel fuel has a higher carbon content than gasoline fuel), and we would address this issue in any future EPA GHG standards analysis.

As noted previously, our 2007 analysis relied upon the use of key inputs concerning predictions of future technologies and fuel prices and valuation of a number of externalities, such as the benefits of climate change mitigation and improvements in energy security. The information used for these key inputs can have a significant effect on projections regarding the costs of a standard based on a fixed percentage reduction or the level of a model-optimized standard. In the analyses we present in this notice, we have generally taken an approach similar to NHTSA's, although we have also used alternative values in some cases to illustrate the impact from different, alternative values. For example, to account for large uncertainties regarding the magnitude of the marginal benefits of GHG emission reductions, we looked at alternative approaches to valuing those benefits and developed a range of values to capture the uncertainties. (See section III.G in this ANPR for a discussion of GHG benefits issues and marginal benefits estimates.)

Another key, but uncertain, input is the future price of fuel. Important for any analysis of fuel savings over a long time frame is an adequate projection of future oil prices. Typically, EPA relies on Annual Energy Outlook (AEO) forecasts made by the Energy Information Agency. However, AEO forecasts in past decades have at times over-predicted the price of oil, and more recently, with the rapid increase in oil prices over the past several years, AEO forecasts have consistently under-predicted near-term oil prices. In the Light-duty Vehicle TSD analysis, we used the Energy Information Administration's 2007 AEO projections for future oil and fuel prices, which correspond to a projected retail gasoline price of slightly more than $2 per gallon in the 2010–2020 time period, while current gasoline fuel prices are on the order of $3.50 to $3.80 per gallon or more. Since our analyses are sensitive to the oil price used, this raised concerns regarding the ability to accurately estimate fuel savings. In addition, when using a model-optimized approach, this can have a significant impact on the appropriate standard predicted by the model. For our updated analysis (described in more detail below), however, we have continued to use the AEO2007 forecasted fuel prices. The ''baseline'' for our Light-duty Vehicle TSD and updated analysis reflects projections from the automotive manufacturers regarding future product offerings which were developed by the manufacturers in late 2006 through the spring of 2007. The AEO2007 fuel price projections are more representative of the fuel prices considered by the manufacturers when they developed the baseline future product offerings used as an input in the analysis.

This approach has certain limitations. Given the large increases in fuel price in the past year, most major automotive companies have since announced major changes to their future product offerings, and these changes are not represented in our analysis. However, the projection of future product offerings (model mix and sales volume) is static in the analysis we have performed, both for the baseline (projections with no new standards) and in the control scenarios (projections with the impact of new standards). Our analysis to date does not account for a range of possible consumer and automaker responses to higher fuel prices, higher vehicle prices and attribute-based standards that could affect manufacturer market share, car/truck market share, or vehicle model mix changes. EPA has initiated work with Resources for the Future to develop a consumer choice economic model which may allow us to examine the impact of consumer choice and varying fuel prices when analyzing potential standard scenarios in the future, and to more realistically estimate a future baseline. Higher fuel prices than those predicted in AEO2007 can certainly have a large impact on the projected costs and benefits of future light-duty GHG limits, and we will continue to examine this issue as part of our on going work.

We ask for comment on the relative importance of, and how best to address, the various issues we have highlighted with our analysis of potential light-duty vehicle GHG standards performed to date. In particular, we seek comment on the feasibility and utility of incorporating into the regulations themselves a mechanism for correcting mistaken future projections or accomplishing the same through a periodic review of the regulations.

We now summarize the results from our 2007 analysis. Since 2007 we have updated this analysis to address several of the issues noted above, in order to evaluate the impact of these issues. EPA requests comment on the two approaches we examined for setting standards, and seeks input on alternative approaches, including the approach described in section VI.B.1.a.

In Table VI–1 we present weighted combined car and truck standards we developed based on efforts to update the work we did in 2007 to address some of the issues identified above. We show the results from our 2007 analysis, as well as the updated results when we utilize the same methodology for the 4% per year approach, but attempt to address a number of the issues discussed above. As part of addressing these issues, we have extended the time frame for our analysis to 2020, while our Light-duty Vehicle TSD analysis was limited to 2018. Our updated analysis results are documented in a separate technical memorandum available in the public docket for this Advance Notice.[130]

TABLE VI–1—PROJECTED VEHICLE CO_2 (GRAM/MILE UNITS) AND MPG STANDARDS (MPG UNITS IN SQUARE BRACKETS), INCLUDING A/C CO_2 LIMITS

Year	Light-duty vehicle TSD analysis		Updated 2008 analysis
	4% per year	Model-Optimized	4% per year
2011	338 [26.3]	334 [26.6]	335 [26.5]
2012	323 [27.5]	317 [28.0]	321 [27.7]
2013	309 [28.8]	295 [30.1]	307 [28.9]
2014	296 [30.0]	287 [31.0]	293 [30.3]
2015	285 [31.2]	281 [31.6]	283 [31.4]
2016	274 [32.4]	275 [32.3]	272 [32.7]
2017	263 [33.8]	270 [32.9]	261 [34.0]
2018	253 [35.1]	266 [33.4]	251 [35.4]
2019	n/a	n/a	241 [36.9]
2020	n/a	n/a	232 [38.3]

Compared to the Light-duty Vehicle TSD analysis, we have attempted in the updated analysis to address for potential CAA purposes several, but not all, of the noted issues, and as such we continue to believe that the results of this analysis are conservative—that is, they tend to overestimate the costs and/or underestimate the benefits. We have included the following updates:

—Inclusion of plug-in hybrids as a viable technology beginning in 2012;
—Consideration of multi-year planning cycles available to manufacturers;
—Consideration of CO_2 trading between car and truck fleets within the same manufacturer;
—Assumption that all major manufacturers would comply with the standards rather than paying a monetary penalty;
—Correction of the CO_2 reduction effectiveness for diesel technology.

Our updated analysis does not address all of the issues we discussed previously. For example, we have not considered the widespread use of lightweight materials, further improvements in the CO_2 reduction effectiveness of existing technologies, potential for cost reductions beyond our 2007 analysis, and the potential for new technologies. We also have not addressed the potential changes in vehicle market shifts that may occur in the future in response to new standards, new consumer preferences, or the potential for higher fuel prices. Recent trends in the U.S. auto industry indicate there may be a major shift occurring in consumer demand away from light-duty trucks and SUVs and towards smaller passenger cars.[131] Such potential trends are not captured in our analysis and they could have a first-order impact on the results.

Table VI–2 summarizes the most important societal and consumer impacts of the standards we have analyzed.

[130] See EPA Technical Memorandum, ''Documentation of Updated Light-duty Vehicle GHG Scenarios.''

[131] See ''As Gas Costs Soar, Buyers Are Flocking to Small Cars'', New York Times, May 2, 2008, page A1.

TABLE VI–2—SUMMARY OF SOCIETAL AND CONSUMER IMPACTS FROM POTENTIAL LIGHT-DUTY VEHICLE GHG STANDARDS

[2006 $s, AEO2007 oil prices]

	Light-duty vehicle TSD analysis *		Updated 2008 analysis
	4% per year	Model-Optimized	4% per year
Societal Impacts			
GHG Reductions (MMTCO$_2$ equivalent in 2040)	378	343	635
Fuel Savings (million bpd in 2040)	2.3	2.0	4.2
Net Societal Benefits in 2040 (Billion $s) **	$54 + B	$54 + B	$130 + B
Net Present Value of Net Benefits through 2040 (Billion $s): **			
3% DR	$320 + B	$390 + B	$830 + B
7% DR	$120 + B	$160 + B	$340 + B
Consumer Impacts			
Per-Vehicle Costs:			
2015	$736	$672	$565
2018	$1,567	$995	$1,380
2020	n/a	n/a	$1,924
Payback Period: ***			
3% DR	6.2 yr. (2018)	4.8 yr. (2018)	6.0 yrs. (2020)
7% DR	8.9 yr. (2018)	6.0 yr. (2018)	8.7 yrs. (2020)
Lifetime Monetary Impact: ***			
3% DR	$2,753 (2018)	$2,245 (2018)	$1,630 (2020)
7% DR	$1,850 (2018)	$1,508 (2018)	$437 (2020)

* The Light-duty Vehicle TSD Societal Impacts are based on new stds. for 2011–2018 for cars and 2012–2017 for trucks, while the updated analysis is based on new stds. for 2011–2020 for cars and trucks.

** The identified "B" = unquantified benefits, for example, we have not quantified the co-pollutant impacts (PM, ozone, and air toxics), and does not include a monetized value for the social cost of carbon. Societal benefits exclude all fuel taxes because they represent transfer payments. In addition, for the updated analysis, we have not included the increased costs nor the GHG emissions of electricity associated with the use of plug-in electric hybrid vehicles. We have also not quantified the costs and/or benefits associated with changes in consumer preferences for new vehicles.

*** The payback period and lifetime monetary impact values for Light-duty Vehicle TSD analysis is for the average 2018 vehicle, and 2020 for the updated analysis.

Given the current uncertainty regarding the social cost of carbon, Table VI–2 does not include a monetized value for the reduction in GHG emissions. We present here a number of different values and indicate what impact they would have on the net social benefits for our updated analysis. Presentation of these values does not represent, and should not be interpreted to represent, any determination by EPA as to what the social cost of carbon should be for purposes of calculating benefits pursuant to the Clean Air Act.

We have analyzed the valuation for the social cost of carbon of $40 per metric ton (for emission changes in year 2007, in 2006 dollars, grown at a rate of 3% per year) that reflects potential global, including domestic, benefits of climate change mitigation. This valuation (which is the mean value from a meta analysis of global marginal benefits estimates for a 3% discount rate discussed in section III.G. of this Advance Notice) would result in an increase in the 2040 monetized benefits for the 2008 updated analysis of $67 billion. Given the nature of the investment in GHG reductions, we believe that values associated with lower discount rates should also be considered. For example, for a 2% discount rate for year 2007, the mean value from the meta analysis is $68 per metric ton. This valuation would result in an increase in the 2040 monetized benefits for the 2008 updated analysis of $110 billion.

As discussed in section III.G, another approach to developing a value for the social cost of carbon is to consider only the domestic benefits of climate change mitigation. The two approaches—use of domestic or global estimates—are discussed in section III.G of this notice. There is considerable uncertainty regarding the valuation of the social cost of carbon, and in future analyses EPA would likely utilize a range of values (see section III.G).[132] Furthermore, current estimates are incomplete and omit a number of impact categories such that the IPCC has concluded that current estimates of the social cost of carbon are very likely to underestimate the benefits of GHG reductions.

This Advance Notice asks for comment on the appropriate value or range of values to use to quantify the benefits of GHG emission reductions, including the use of a global value. While OMB Guidance allows for consideration of international effects, it also suggests that the Agency consider domestic benefits in regulatory analysis. Section III.G.4 discusses very preliminary ranges for U.S. domestic estimates with means of $1 and $4 per metric ton in 2007, depending on the discount rate. These valuations ($1 and $4 per metric ton in 2007) would result in an increase in the 2040 monetized benefits for the 2008 updated analysis of $1.7–6.7 billion. In its recent proposed rulemaking, NHTSA utilized $7 per metric ton as the initial value for U.S. CO_2 emissions in 2011.

Table VI–2 shows the impact of addressing a number of the issues noted

[132] Ranges better reflect the available scientific information and the uncertainties in marginal benefits estimates, and the fact that there are estimates well above the means. The corresponding ranges for the 2007 mean estimates discussed above are the following: For the meta-analysis global marginal benefits estimates, the range is $−4 to $106 per metric ton CO_2 based on a 3 percent discount rate, or $−3 to $159 per metric ton CO_2 based on a 2 percent discount rate. The preliminary domestic ranges derived from a single model are $0 to $5 per metric ton CO_2 based on a 3 percent discount rate, and $0 to $16 per metric ton CO_2 based on a 2 percent discount rate.

above. With respect to per-vehicle costs, the updated 4% per year approach shows a $171 per vehicle lower cost in 2015 and a $187 per vehicle lower cost in 2018 compared to our 2007 analysis, for a slightly more stringent standard in both cases. This is primarily due to the impact of including multi-year planning and car-truck trading within a given manufacturer.

The estimated CO_2 reductions in 2040 from the updated analysis are much larger than the 2007 analysis (by nearly a factor of 2). This occurs primarily because we have addressed the diesel CO_2 issue noted above, and because we have extended the time frame for the analyzed standards to 2020. The estimated fuel savings are also larger primarily due to the additional years we extended the 4% per year standard to. The estimated monetized net benefits for the updated analysis are also significantly higher than our previous estimates. This is a result of a combination of factors: lower estimates for the increased vehicle costs due to multi-year planning and within manufacturer car-truck trading; and the extension of the analyzed standards to 2020.

Table VI–2 also provides estimates of ''payback period'' and ''lifetime monetary impact''. The payback period is an estimate of how long it will take for the purchaser of the average new vehicle to break-even; that is, where the increased vehicle costs is off-set by the fuel savings. Our updated analysis shows for the average 2020 vehicle that period of time ranges from 6.0 to 8.7 years (depending upon the assumed discount rate). The lifetime monetary impact provides an estimate of the costs to the consumer who owns a vehicle for the vehicle's entire life. The lifetime monetary impact is simply the difference between the higher initial vehicle cost increase and the lifetime, discounted fuel savings. Our updated analysis indicates the lifetime, discounted fuel savings will exceed the initial cost increase substantially. As shown in the table, the positive lifetime monetary impact ranges from about $440 to $1,630 per vehicle (depending upon the assumed discount rate). Section VI.C.2 of the Light-duty Vehicle TSD discusses possible explanations for why consumers do not necessarily factor in these fuel savings in making car-buying decisions.

Our updated analysis projects the 2020 CO_2 limit of 232 gram/mile (38.3 mpg) shown in Table VI–1, could be achieved with about 33% of the new vehicle fleet in 2020 using diesel engines and full hybrid systems (including plug-in electric hybrid vehicles). Higher penetrations of these and other advanced technologies (including for example the wide-spread application of light-weight materials) could result in a much greater GHG reductions.

The results of our updated analysis indicate that:

—Technology is readily available to achieve significant reductions in light-duty vehicle GHG emissions between now and 2020 (and beyond);

—The benefits of these new standards far outweigh their costs;

—Owners of vehicles complying with the new standard will recoup their increased vehicle costs within 6–9 years, and;

—New standards would result in substantial reductions in GHGs.

We request comment on all aspects of this analysis, the appropriateness of the two approaches described, and the inputs and the tools that we utilized in performing the assessment, when considering the setting of light-duty vehicle GHG standards under the CAA. We also request comment on the alternative approach for establishing light-duty vehicle GHG standards described in section VI.B.1.a of this advance notice.

c. Technologies Available To Reduce Light-Duty Vehicle GHGs

In this section we discuss a range of technologies that can be used to significantly reduce GHG emissions from cars and light trucks. We discuss EPA's assessment of the availability of these technologies, their readiness for introduction into the market, estimates of their cost, and estimates of their GHG emission reduction potential. We request comment on all aspects of our current assessment, including supporting data regarding technology costs and effectiveness.

In the past year EPA undertook a comprehensive review of information in the literature regarding GHG-reducing technologies available for cars and light trucks. In addition, we reviewed confidential business information from the majority of the major automotive companies, and we met with a large number of the automotive companies as well as global automotive technology suppliers regarding the costs and effectiveness of current and future GHG-reducing technologies. EPA also worked with an internationally recognized automotive technology firm to perform a detailed assessment of the GHG reduction effectiveness of a number of advanced automotive technologies.[133]

EPA recently published a Staff Technical Report describing the results of our assessment, and we provided this report to the National Academy of Sciences Committee on the Assessment of Technologies for Improving Light-Duty Vehicle Fuel Economy.[134] This Staff Technical Report details our estimates of the costs and GHG reduction potential of more than 40 technologies applicable to light-duty vehicles, and is one of the key inputs to our analysis of potential future standards presented in Section VI.B.1.b. These technologies span a large range of effectiveness and technical availability, from technologies as simple as reduced rolling resistance tires (offering a 1–2% reduction in vehicle CO_2 emissions) to advanced powertrain systems like gasoline and diesel hybrids, plug-in electric hybrids, and full electric vehicles (offering up to a 100% reduction in vehicle CO_2 emissions).

The majority of the technologies we investigated are in production and available on vehicles today, either in the United States, Japan or Europe. Over the past year, most of the major automotive companies or suppliers have announced the introduction of new technologies to the U.S. market. The following are some recent examples:

—Ford's new ''EcoBoost'' turbocharged, down-sized direct-injection gasoline engines;

—Honda's new 2009 global gasoline hybrid and 2009 advanced diesel powertrain;

—Toyota and General Motors plans for gasoline plug-in hybrid systems within the next two to three years;

—General Motors breakthroughs in lower-cost advanced diesel engines;

—Nissan's 2010 introduction of a clean diesel passenger car;

—Chrysler's widespread use of dual-clutch automated manual transmissions beginning in 2009; and,

—Mercedes' new product offerings for clean diesel applications as well as diesel-electric hybrid technologies.

We also evaluated the costs and potential GHG emissions reductions from some of the advanced systems not currently in production or that are only available in specialty niche vehicles, such as gasoline homogeneous charge compression ignition engines, camless valve actuation systems, hydraulic hybrid powertrains, and full electric

[133] See ''A Study of Potential Effectiveness of Carbon Dioxide Reducing Vehicle Technologies'', Ricardo, Inc., EPA Report 420–R–08–004a, June 2008.

[134] See ''EPA Staff Technical Report: Cost and Effectiveness Estimates of Technologies Used to Reduce Light-duty Vehicle Carbon Dioxide Emissions'', EPA Report 420–R–08–008, March 2008.

vehicles. These technologies are described in detail, along with our estimates for costs and GHG reduction potential, in our Staff Technical Report.

An additional area where we see opportunities for significant CO_2 emissions reduction is in material weight substitution. The substitution of traditional vehicle materials (e.g., steel, glass) with lighter materials (e.g., aluminum, plastic composites) can provide substantial reductions in CO_2 emissions while maintaining or enhancing vehicle size, comfort, and safety attributes. Several companies have recently announced plans to utilize weight reduction as a means to improve vehicle efficiency while meeting all applicable safety standards.[135] We request data and comment on the extent to which material substitution should be considered as a means to reduce GHG emissions, and information on the costs and potential scope of material substitution over the next 5 to 20 years.

Finally, we note that in the past 30 years there has been a steady, nearly linear increase in the performance of cars and light trucks. We estimate that the average new vehicle sold in 2007 had a 0–60 miles/hour acceleration time of 9.6 seconds—compared to 14.1 seconds in 1975.[136] If this historic trend continues, by 2020 the average 0–60 acceleration for the combined new car and truck fleet will be less than 8 seconds. During the past 20 years, this increase in acceleration has been accompanied by a gradual increase in vehicle weight. It is generally accepted that over the past 20 years, while fuel economy for the light-duty fleet has changed very little, the fuel efficiency has in fact improved but has largely been used to enable increases in both the weight and the performance of vehicles. We request comment on how we should consider the potential for future changes in vehicle weight and performance (e.g., acceleration time) in assessing the costs and benefits of standards for reducing GHG emissions.

d. Potential Options for Reducing HFCs, N_2O, CH_4, and Air Conditioning-Related CO_2

As described above, in addition to fleet average and in-use CO_2 standards, EPA has analyzed how new control measures might be developed for other car and light truck emissions that have global warming impacts: air conditioning (''A/C'')-related emissions of HFCs and CO_2, and tailpipe emissions of nitrous oxide (N_2O), and methane (CH_4). Under CAA section 202(a), EPA may regulate these emissions if a positive endangerment finding is made for the relevant GHGs. Together, these emissions account for about 10% of greenhouse gases from light-duty cars and trucks (on a CO_2 equivalent basis). The direct HFC emissions account for 4.3%, while the A/C CO_2 emissions are 3.1%. N_2O and CH_4 account for 2.7% and 0.2% respectively. With regard to air conditioning-related emissions, significant opportunity exists to reduce HFC emissions from refrigerant leakage and CO_2 from A/C induced engine loads, and EPA has considered potential standards to reduce these emissions. In addition, EPA has considered potential limits for N_2O and CH_4 emissions that could apply to both cars and light trucks that would limit future growth of these emissions.

i. Potential Controls for Air Conditioning-Related GHG Emissions

Over 95% of the new cars and light trucks in the U.S. are equipped with A/C systems. There are two mechanisms by which A/C systems contribute to the emissions of GHGs. The first is through direct leakage of the refrigerant (currently the HFC compound R134a) into the air. Based on the higher GWP of HFCs, a small leakage of the refrigerant has a greater global warming impact than a similar amount of emissions of other mobile source GHGs. Leakage can occur slowly through seals, gaskets, hose permeation and even small failures in the containment of the refrigerant, or more quickly through rapid component deterioration, vehicle accidents or during maintenance and end-of-life vehicle scrappage (especially when refrigerant capture and recycling programs are less efficient). The leakage emissions can be reduced through the choice of leak-tight, durable components, or the global warming impact of leakage emissions can be addressed through the implementation of an alternative refrigerant. Refrigerant emissions during maintenance and at the end of the vehicle's life (as well as emissions during the initial charging of the system with refrigerant) are already addressed by the CAA Title VI stratospheric ozone protection program, as described in section VIII of this notice.[137]

EPA's analysis indicates that together, these A/C-related emissions account for about 7.5% of the GHG emissions from cars and light trucks. EPA considered standards designed to reduce direct leakage emissions by 75% and to reduce the incremental increase of A/C related CO_2 emissions by 40% in model year 2015 vehicles, phasing in starting in model year 2012. It is appropriate to separate the discussion of these two categories of A/C-related emissions because of the fundamental differences in the emission mechanisms and the methods of emission control. Refrigerant leakage control is akin in many respects to past EPA fuel evaporation control programs in that containment of a fluid is the key control feature, while efficiency improvements are more similar to the vehicle-based control of CO_2 in that they would be achieved through specific hardware and controls.

The Memo to the Docket, ''Light-Duty Vehicle Hydrofluorocarbon, Nitrous Oxide, Methane, and Air Conditioning-Related Carbon Dioxide Emissions'' provides a more detailed discussion of the air conditioning-related GHG emissions, both refrigerant leakage and CO_2 emissions from A/C use, as well as potential test procedure and compliance approaches that have been considered by EPA.

ii. Feasibility of Potential A/C Reduction Approaches

EPA believes that significant reductions in A/C HFC leakage and A/C CO_2 emissions would be readily technically feasible and highly cost effective. The types of technologies and methods that manufacturers could use to reduce both types of A/C emissions are commercially available and used today in many models of U.S. cars and light trucks. For example, materials and components that reduce leakage as well as electronic monitoring systems have been used on various vehicles in recent years. Regarding A/C CO_2 reduction, such technologies as variable-displacement compressors and their controls are also in use today. Although manufacturers might find that more advanced technologies, like alternate refrigerants, become economically attractive in the coming years, EPA believes that currently available technologies and systems designs would

[135] See Automotive News, February 11, 2008, in which Daimler-Benz CEO states that Mercedes-Benz will reduce the weight of all new vehicle models by 5%, and Ford announces every model will lose between 250 and 750 pounds.

[136] See ''Light-Duty Automotive Technology and Fuel Economy Trends: 1995–2007'', EPA Report EPA420–R–07–008, September 2007.

[137] The second mechanism by which vehicle A/C systems contribute to GHG emissions is through the consumption of excess fuel when the A/C system is running, and from carrying around the weight of the A/C system hardware all-year round. This excess fuel required to run the system is converted into CO_2 by the engine during combustion. This excess CO_2 from A/C operation can thus be reduced by increasing the efficiency of the overall vehicle-A/C system.

be sufficient to meet potential limits being assessed by EPA.

iii. Potential Impacts of Requiring Improved A/C Systems

(1) Emission Reductions for Improved A/C Systems

Manufacturers producing cars and light trucks for the U.S. market have not historically had economic or regulatory incentives or requirements to reduce refrigerant leakage and CO_2 from A/C systems. As a result, there is an opportunity for significant reductions in both of these types of emissions. With potential standards like the ones considered above, EPA has estimated that reductions in HFC refrigerant leakage, converted to CO_2 equivalent emissions, and added to projected A/C CO_2 reductions, these limits would result in an average per-vehicle reduction in CO_2-equivalent emissions of about 4.7% (excluding CH_4 and N_2O from the baseline). This reduction is equivalent to about 7.5% of light vehicle CO_2-equivalent emissions, or about 2 tons per year.

(2) Potential Costs for Improved A/C Systems

Although the technologies and system designs EPA expects could be used to comply with the two A/C related standards being considered are currently available, not all manufacturers are using them on all vehicles. Thus, the industry would necessarily incur some costs to apply these technologies more broadly across the car and truck fleet. EPA estimates that the cost of meeting the full HFC leakage standard it is considering would average about $40 per vehicle (retail price equivalent or RPE) and that the cost of meeting the A/C CO_2 standard would be about $70 per vehicle (RPE). At the same time, complying with such limits would result in very significant savings in fuel costs (as system efficiency improves) and in A/C-related maintenance costs (as more durable systems result in less frequent repairs). In fact, EPA's analysis shows that these cost savings would significantly exceed projected retail costs of the potential A/C standards, more than offsetting the costs of both types of A/C system improvements.[138]

iv. Potential Interaction With Title VI Refrigerant Regulations

As described further in Section VIII of this notice, Title VI of the CAA deals with the protection of stratospheric ozone. Section 608 of the Act establishes a comprehensive program to limit emissions of certain ozone-depleting substances (ODS) from appliances and refrigeration. The rules promulgated under section 608 regulate the use and disposal of such substances during the service, repair or disposal of appliances and industrial process refrigeration. In addition, section 608 and the regulations promulgated under it prohibit the knowingly venting or releasing ODS during the course of maintaining, servicing, repairing or disposing of an appliance or industrial process refrigeration equipment. Section 609 governs the servicing of motor vehicle air conditioners (MVACs). The regulations promulgated under section 609 (40 CFR part 82, subpart B) establish standards and requirements regarding the servicing of MVACs. These regulations include establishing standards for equipment that recovers and recycles or only recovers refrigerant (CFC–12, HFC 134a, and for blends only recovers) from MVACs; requiring technician training and certification by an EPA-approved organization; establishing recordkeeping requirements; imposing sales restrictions; and prohibiting the venting of refrigerants.

Another Title VI provision that could interact with potential Title II motor vehicle regulation of GHGs is section 612, which requires EPA to review substitutes for ozone depleting substances and to consider whether such substitutes would cause an adverse effect to human health or the environment as compared with other substitutes that are currently or potentially available. EPA promulgated regulations for this program in 1992 and those regulations are located at 40 CFR part 82, subpart G. When reviewing substitutes, in addition to finding them acceptable or unacceptable, EPA may also find them acceptable so long as the user meets certain use conditions. For example, all motor vehicle air conditioning system must have unique fittings and a uniquely colored label for the refrigerant being used in the system.

EPA views the potential program analyzed here as complementing these Title VI programs, and not conflicting with them. The potential standards would apply at pre-production when manufacturers demonstrate that they are utilizing requisite equipment (or utilizing other means designated in the potential program) to achieve the suggested 75% leak reduction requirement. These requirements would dovetail with the Title VI section 609 standards which apply to maintenance events, and to end-of-vehicle life disposal. In fact, as noted, a benefit of a program is that there could be fewer and less impactive maintenance events for MVACs, since there would be less leakage. In addition, although the suggested standards would also apply in-use, the means of enforcement should not conflict (or overlap) with the Title VI section 609 standards. EPA also believes the menu of leak control technologies described above would complement the section 612 requirements because these control technologies would help ensure that 134a (or other refrigerants) would be used in a manner that would further minimize potential adverse effects on human health and the environment.

v. Potential Controls for Nitrous Oxide Emissions

Nitrous oxide, or N_2O, is emitted from gasoline and diesel car and light truck tailpipes and is generated during specific catalyst warm-up temperature conditions conducive to N_2O formation. While N_2O emissions from current Tier 2 vehicles with conventional three-way catalysts are relatively low on a mass basis (e.g., around 0.005 g/mi), N_2O does have a high GWP of 310. N_2O is a more significant concern with diesel vehicles (and potentially future gasoline lean-burn engines) equipped with advanced catalytic NO_X emissions control systems. These systems can (but need not) be designed in a way that emphasizes efficient NO_X control while allowing the formation of significant quantities of N_2O. Excess oxygen present in the exhaust during lean-burn conditions in diesel (or lean-burn gasoline) engines equipped with these advanced systems can favor N_2O formation if catalyst temperatures are not carefully controlled. Without specific attention to controlling N_2O emissions in the development of such new NO_X control systems, vehicles could have N_2O emissions many times greater than are emitted by current gasoline vehicles.

EPA has considered a ''cap'' approach to controlling N_2O emissions would not require any new technology for current Tier 2 gasoline vehicles, but would limit any increases in N_2O emissions that might otherwise occur with future technology vehicles. Such an approach would have minimal feasibility, emissions, or cost impacts.

The Memo to the Docket, ''Light-Duty Vehicle Hydrofluorocarbon, Nitrous Oxide, Methane, and Air Conditioning-Related Carbon Dioxide Emissions'' has more in-depth discussion of car and light truck N_2O emissions, as well as of potential test procedure and compliance

[138] See Appendix 3.B. of the EPA Technical Memorandum ''Documentation of Updated Light-duty Vehicle GHG Scenarios'' for a detailed discussion of these costs estimates.

approaches that have been considered by EPA.

vi. Potential Controls for Methane Emissions

Methane, or CH_4, is emitted from gasoline and diesel car and light truck tailpipes and is one of the family of hydrocarbon compounds generated in the engine as a by-product of gasoline and diesel fuel combustion. As such, levels of CH_4 emissions have been somewhat controlled by the lower hydrocarbon emissions standards that have been phased in since the early 1970s. Current CH_4 emissions from Tier 2 gasoline vehicles are relatively low (about 0.017 g/mi on average), and CH_4 has a global warming potential of 23. The one technology where much higher CH_4 emissions could be of concern would be natural gas-fueled vehicles, since CH_4 is the primary constituent of natural gas fuel and would be the largest component of unburned fuel emissions.

As with N_2O, EPA has considered a ''cap'' CH_4 emissions standard approach that would not require any new technology for current Tier 2 gasoline vehicles, but would limit any increases in CH_4 emissions that might otherwise occur with future natural gas vehicles. Such an approach would have no significant feasibility, emissions, or cost impacts.

The Memo to the Docket, ''Light-Duty Vehicle Hydrofluorocarbon, Nitrous Oxide, Methane, and Air Conditioning-Related Carbon Dioxide Emissions'' has greater discussion of car and light truck CH_4 emissions.

e. Specific Programmatic Design Issues

As discussed above, Title II of the CAA provides the Agency with both direction and flexibility in designing and implementing a GHG control program. Consistent with existing motor vehicle programs, the Agency would need to develop appropriate mechanisms to address issues such as certification of new motor vehicles to applicable standards, ensuring the emissions requirements are being met throughout the designated useful life of the vehicle, and appropriate compliance mechanisms if the requirements are not being met. Domestic and imported vehicles and engines subject to emissions standards must obtain a certificate of conformity in order to be sold in the U.S. marketplace. EPA has utilized a wide range of program design tools and compliance mechanisms to help address the large variation of market participants yet still provide a level regulatory playing field for these parties. As part of the design effort for a GHG program, it would be appropriate to take into account these flexibilities as well as existing requirements that the automobile and engine industries already face in order to help reduce compliance costs if possible while still maintaining our overall environmental objectives. However, given the nature of GHG control, it would also be appropriate to determine if new design structures and compliance measures might be more effective.

The Light-duty Vehicle TSD includes a discussion of a wide range of programmatic and technical issues and presents potential approaches that would address these issues in the design of a comprehensive near-term light-duty vehicle GHG control program. We highlight here a few of these issues, and point the reader to the Light-duty Vehicle TSD for additional detail. Among the issues discussed in the Light-duty Vehicle TSD are several which could differ significantly under a different approach. EPA specifically requests comment on these issues:

—Potential classification approaches for light-duty vehicles (e.g., treating cars and light trucks in a single averaging class or separate, and the potential classification of vehicle types as either a passenger car or a light truck);
—How any classification approaches would relate to NHTSA's regulatory approach;
—The significant flexibilities allowed under Title II which we utilize for existing criteria pollutant standards for light-duty vehicles, including detailed concepts for a GHG averaging, banking, and trading program;
—Potential light-duty GHG compliance program concepts.

As we have considered various potential light-duty vehicle GHG approaches, significant thought and stakeholder outreach went into designing a potential system for determining compliance that would meet Agency and industry needs and goals. The Light-duty Vehicle TSD presents a compliance structure for vehicle GHG control that adheres to CAA requirements and at the same time is compatible with the existing CAFE program. However, this is not the only approach to compliance, as is discussed in the Light-duty Vehicle TSD. Other compliance approaches could also be considered, each with their own advantages. For example, a GHG compliance program patterned after the Tier 2 light duty vehicles emissions program offers an approach that is more similar to the existing compliance structure for other pollutants.

We discuss below in detail three specific issues regarding potential future light-duty vehicle GHG programmatic issues: universal and attribute-based standards; environmental backstop standards; and tailpipe CO_2 test cycles.

i. Universal and Attribute-Based Vehicle GHG Standard Approaches

A specific programmatic issue that EPA would like to highlight here is the use of attribute-based standards for vehicle GHG standards, and the concept of an environmental backstop to accompany an attribute-based standard promulgated under the CAA, in order to assure that GHG emission reductions which are feasible at reasonable cost under section 202(a) are not foregone. A CAA program for reducing GHG emissions from light vehicles could set the average emissions standards for manufacturers in one of two fundamental ways. A ''universal'' GHG standard would apply a single numerical requirement to each manufacturer, to be met on average across its entire light-duty vehicle production. One potential consequence of the universal approach is that the costs of compliance may fall unevenly on different manufacturers. That is, complying with a single standard would be more difficult for companies with current product mixes weighted relatively heavily toward vehicles with higher compliance costs.

The other approach EPA has considered would set individual standards for each manufacturer, based on one or more vehicle attributes (such as the footprint attribute approach currently used by NHTSA). Thus, to the extent a manufacturer produced vehicles with different attributes from the vehicles of another manufacturer; unique standards would be set for each company. The Light-duty Vehicle TSD discusses various vehicle attributes on which light duty vehicle CO_2 standards could be based. EPA requests comment on the use of an attribute-based approach, and on each of the attributes considered in the Light-duty Vehicle TSD, as well as on a universal standard approach. In addition, some in the industry have suggested power-to-weight ratio may be an appropriate attribute for this purpose, and we request comment on that attribute as well.

A key characteristic of any attribute-based program is that significant industry shifts in the attribute over time would increase or decrease the average emission performance requirement for the fleet. For example, if such a shift in attributes resulted in the unique manufacturer standards being on average less stringent than those determined to be feasible and cost-effective in the establishment of the program, the program would fall short of those overall emissions reductions, and conversely, market shifts could also result in larger emissions reductions than those determined to be feasible and cost-effective at the time the program was established. EPA seeks comment on the universal approach as compared to the attribute-based approach.

ii. Concepts for Light-Duty Vehicle GHG Environmental Backstops

In order to limit the potential loss of feasible emissions control due to a change in market attributes, EPA could consider a supplemental ''backstop'' carbon dioxide emissions standard for each year (also referred to as an ''anti-backsliding'' provision) as a complement under the CAA to an attribute-based standard. This would be an additional obligation for manufacturers that would limit the maximum fleet average carbon dioxide emissions, independent of attributes. The backstop requirement could establish fixed minimum and feasible fleet average CO_2 g/mile standards. The backstop would apply separately to the domestic car, import car, and truck classes. This backstop obligation may not apply to small volume manufacturers. While EPA will quantitatively describe one specific backstop concept below, we are seeking public comment on a range of alternative approaches described qualitatively below, briefly, as well. More generally, EPA seeks comment as to whether a backstop approach would be appropriate under the CAA as a means of providing greater emission reduction certainty.

A backstop could be an appropriate complement under the CAA to an attribute-based standard. The most important factor under section 202(a) of the Act is to ensure reductions of the emissions from the motor vehicle sector which cause or contribute to the endangerment caused by greenhouse gas emissions. As discussed earlier, one important feature of an attribute-based program is that collective decisions by consumers and manufacturers could result in higher or lower industry-wide average footprint values than projected by EPA at the time of promulgation. Since the attribute-based curve establishes a fleet average for a manufacturer based on the manufacturer's sales and attribute values, the actual reductions achieved by the program could vary as this mix varies. In the extreme, if the entire industry moved to much higher attribute values, then the carbon dioxide emissions reductions could be significantly less than projected by EPA as technically feasible and cost effective.

Under section 202(a), EPA could consider a supplemental fleet average backstop standard that would be the same for every manufacturer in a given year. Such a standard would ensure that a minimum level of reductions would be achieved as the fleet mix changes over time. EPA could base such a standard on feasible carbon dioxide emission reductions and other important factors such as technological feasibility, cost, energy, and safety in analyzing section 202(a) standards. EPA recognizes that a CO_2 emissions backstop could partially reduce the flexibility and market elements of an attribute-based approach, but believes it could be needed to provide for an appropriate degree of emissions reduction certainty.

As with other structural issues such as universal versus attribute-based approaches, EPA believes that various backstop approaches have conceptual advantages and disadvantages with respect to relevant criteria such as certainty of industry-wide carbon dioxide emissions reductions, flexibility with respect to consumer choice and vehicle offerings, varying treatment of automakers, and complexity of explanation and implementation. Any approach would also need to address the relevant factors, including cost (economic feasibility, cost effectiveness, and per vehicle cost) and technological feasibility. EPA encourages commenters to evaluate the design approaches presented below, as well as to suggest alternative approaches, in terms of these and other relevant criteria.

As an illustrative example, Table VI–3 shows one set of fleet average carbon dioxide emissions and mpg backstops, along with the projected, average industry-wide carbon dioxide emissions and mpg compliance levels, for the two sets of fleet average carbon dioxide emissions standards based on the footprint attribute, analyzed in December 2007, and discussed earlier in this advance notice: The 4% per year and model-optimized scenarios. These carbon dioxide emissions backstops are based on the projected fleet average carbon dioxide emissions compliance levels for the high-volume car and light truck manufacturers with the highest projected car and light truck footprint levels, based on the footprint curves that were developed by EPA in December 2007. Chrysler is the high-volume car manufacturer with the highest projected footprint values, and General Motors has the highest projected footprint values among the high-volume truck manufacturers.

These backstops would be universally applied to every manufacturer, except small volume manufacturers, and would become the effective fleet average standard for any automaker that would otherwise have a higher fleet average carbon dioxide emissions standard, for any of the three respective averaging sets (import and domestic cars and trucks), based on the footprint curve.

The underlying rationale for this backstop approach is that the manufacturer that is projected to sell the highest footprint vehicles, which therefore is projected to be able to comply with the highest fleet average carbon dioxide emissions compliance levels, should be treated as establishing the minimum acceptable level of emissions reductions for the industry. Similarly, no other manufacturers should exceed the feasible, cost effective level established by that projected highest footprint manufacturer. The approach, and underlying rationale, is similar to the approach used by NHTSA before the 2006 truck standards, whereby the level of a universal standard was established based on the capabilities of the least capable large manufacturer (*Public Citizen* v. *NHTSA*, 848 F. 2d 256, 259, D.C. Cir. 1988). Although the backstop would not prohibit the highest footprint manufacturer from selling higher footprint vehicles, it would prohibit any carbon dioxide emissions ''backsliding'' that would otherwise be associated with that increase in footprint. Average carbon dioxide emissions from other manufacturers could increase, of course, in accordance with the footprint curve, but in no case could the carbon dioxide emissions level for any manufacturer increase beyond these backstop levels.

The passenger car carbon dioxide emissions and mpg backstop levels shown in Table VI–3 adhere to the methodology described above with one exception. Based on Chrysler's projected footprint values, its 2011 standard for the 4% per year option would be 325 g/mi, equivalent to a gasoline vehicle fuel economy of 27.3 mpg. Since the current car CAFE standard, which acts as an effective fuel economy backstop, is 27.5 mpg, EPA could instead consider a 2011 backstop of 323 g/mi for the 4% per year option, which is equivalent to a 27.5 mpg gasoline vehicle.

In this illustrative backstop example, the carbon dioxide emissions backstop levels would range from 8 to 22 g/mi, or 2 to 8%, higher than the projected, average industry-wide carbon dioxide levels.

TABLE VI–3—ILLUSTRATIVE BACKSTOPS FOR THE FLEET AVERAGE CARBON DIOXIDE EMISSIONS STANDARD (CO_2 GRAMS PER MILE/MPG)

	CARS			
	4 percent per year option		Model-optimized option	
	Projected industry-wide CO_2 levels	Backstop	Projected industry-wide CO_2 levels	Backstop
2010 (base)	(323)/27.5		(323)/27.5	
2011	309/28.7	323/27.5	301/29.5	317/28.0
2012	298/29.8	319/27.8	291/30.5	314/28.3
2013	285/31.1	296/30.0	276/32.1	287/30.9
2014	275/32.3	287/30.9	268/33.2	281/31.6
2015	264/33.6	277/32.0	260/34.1	273/32.5
2016	254/34.9	266/33.4	247/35.9	258/34.4
2017	244/36.3	257/34.5	244/36.4	257/34.5
2018	235/37.7	245/36.2	239/37.2	249/35.7

A second illustrative example of a universal backstop approach could be modeled on the ''minimum standard'' in the Energy Independence and Security Act (EISA) of 2007. EISA establishes a fuel economy backstop for the domestic car class that is equal to 92% of the average fuel economy level projected for all cars. EPA believes this 92% value was derived by dividing the current car CAFE standard of 27.5 mpg by the average industry-wide car fuel economy performance over the past several years. The car CAFE standard, in effect, has served as a backstop for those manufacturers that have chosen not to pay CAFE penalties. Applying this model to a carbon dioxide emissions backstop would involve dividing the average projected industry-wide carbon dioxide emissions levels by 0.92, or multiplying by a factor of 1.087, an increase of 8.7%, to generate a universal backstop level that would apply to all manufacturers. Under this approach, the backstop levels for the 4% per year and model-optimized standards in Table VI–3 would be greater than the backstop levels discussed earlier in every case, ranging from 3 to 23 g/mi higher. This alternative approach yields backstop levels 20 to 31 g/mi higher than the projected, average industry-wide standards.

For the backstop approaches discussed above, all automakers would have the same uniform backstop for domestic and import cars, and a higher uniform backstop for trucks. These universal approaches would make the backstop more of a constraint on those manufacturers that sold vehicles with higher average footprint levels and less of a constraint on those automakers that sold vehicles with lower average footprint levels.

An alternative backstop approach could be to establish unique maximum numerical carbon dioxide emissions values that would apply to different automakers (e.g., X g/mi for Automaker A, and Y g/mi for Automaker B) and that would become the effective fleet average standard for an individual automaker when that automaker would otherwise be allowed to meet a higher fleetwide average carbon dioxide emissions value based exclusively on the footprint curve. The rationale for this type of approach would be that since manufacturers start at different average footprint levels, manufacturer-specific backstop values could provide greater insurance against carbon dioxide emissions backsliding for all manufacturers, rather than just those manufacturers that sold vehicles with higher average footprint levels. One illustrative example of this type of approach would be to base the annual backstop for each manufacturer on its 2010 carbon dioxide emissions baseline, reducing it by the same percentage each year. A similar approach would base the annual backstop for the highest-footprint manufacturer on its 2010 carbon dioxide emissions baseline reduced by a percentage each year, the annual backstop for the lowest-footprint automaker on its 2010 carbon dioxide emissions baseline reduced by a lesser percentage per year, and the annual backstop values for other manufacturers on annual percentage reductions between the higher and lower percentages. This latter approach would yield backstop values that would be somewhat more binding on manufacturers that sold vehicles with higher average footprint values, yet still binding to some degree on all automakers. This approach would also limit the degree to which manufacturers that sold vehicles with lower average footprint values could increase average footprint values over time.

A combination of the universal and manufacturer-specific approaches could be to begin with manufacturer-specific backstop values, and to transition to uniform backstop values over a 5 or 10 year period.

Another alternative backstop approach would not set a maximum numerical carbon dioxide emissions value for individual manufacturers, but would establish mathematical functions that would automatically increase the stringency of and/or ''flatten'' the footprint curves for future years when actual industry-wide carbon dioxide emissions performance in the future is found to fall short of EPA's projections at the time of promulgation. For example, at the time of promulgation, EPA could assume a certain average industry-wide carbon dioxide g/mi emissions level for 2011–2012. If, in 2013, EPA found that the average industry-wide emissions level in 2011–2012 was higher than projected in the final rule (and therefore the carbon dioxide emissions reductions were lower than projected because of higher than projected average footprint levels), then the backstop provisions would be triggered and the footprint curves for future years (say, 2016 and later) would be automatically changed to be more stringent and/or flatter in shape. This approach would reframe the backstop issue in terms of industry-wide emissions performance, rather than in terms of individual automaker emissions performance.

In lieu of a backstop, another approach would be to flatten (i.e., reduce the slope of) the carbon dioxide emissions-footprint curve such that there would a major disincentive for automakers to increase vehicle footprint. EPA invites comments on the pros and cons of this approach relative to a backstop.

In conclusion, EPA seeks comment on whether a CO_2 emissions backstop is an appropriate complement to a footprint-based regulatory approach under the CAA to ensure that the program would achieve a minimum level of feasible carbon dioxide emissions reductions. EPA invites comments on both the potential backstop approaches discussed above, as well as suggestions for other approaches.

iii. Potential Test Procedures for Light-Duty Vehicle Tailpipe CO_2 Emissions

For the program options EPA analyzed to date, EPA would expect manufacturers and EPA to measure CO_2 for certification and compliance purposes over the same test procedures currently used for measuring fuel economy, except for A/C-related CO_2 emissions. This corresponds with the data used in our analysis of the potential footprint-based CO_2 standards presented in section VI.B.1.b of this advance notice, as the data on control technology efficiency was also developed in reference to these test procedures. These procedures are the Federal Test Procedure (FTP or ''city'' test) and the Highway Fuel Economy Test (HFET or ''highway'' test). EPA established the FTP for emissions measurement in the early 1970s. In 1976, in response to requirements in the Energy Policy and Conservation Act (EPCA), EPA extended the use of the FTP to fuel economy measurement and added the HFET. The provisions in the 1976 regulation, effective with the 1977 model year, established procedures to calculate fuel economy values both for labeling and for CAFE purposes. Under EPCA, EPA is required to use these procedures (or procedures which yield comparable results) for measuring fuel economy for cars for CAFE purposes, but not for fuel economy labeling purposes. EPCA does not impose this requirement on CAFE test procedures for light trucks, but EPA does use the FTP and HFET for this purpose.

On December 27, 2006, EPA established new ''5-cycle'' test procedures for fuel economy labeling—the information provided to the car-buying public to assist in making fuel economy comparisons from vehicle to vehicle. These procedures were originally developed for purposes of criteria emissions testing, not fuel economy labeling, pursuant to section 206(h) of the Clean Air Act, which requires EPA to review and revise as necessary test procedures for motor vehicles and motor vehicle engines ''to insure that vehicles are tested under circumstances which reflect the actual current driving conditions under which motor vehicles are used.'' In updating the fuel economy labeling regulations, EPA determined that these emissions test procedures take into account several important factors that affect fuel economy in the real world but are missing from the FTP and HFET tests. Key among these factors are high speeds, aggressive accelerations and decelerations, the use of air conditioning, and operation in cold temperatures. Consistent with section 206 (h), EPA revised its procedures for calculating the label estimates so that the miles per gallon (mpg) estimates for passenger cars and light-duty trucks would better reflect what consumers achieve in the real world. Under the new methods, the city miles per gallon estimates for the manufacturers of most vehicles have dropped by about 12% on average relative to the previous estimates, with estimates for some vehicles dropping by as much as 30%. The highway mpg estimates for most vehicles dropped on average by about 8%, with some estimates dropping by as much as 25% relative to the previous estimates. The new test procedures only affect EPA's vehicle fuel economy labeling program and do not affect fuel economy measurements for the CAFE standards, which continue to be based on the original 2-cycle test procedures (FTP/HFET).

EPA continues to believe that the new 5-cycle test procedures more accurately predict in-use fuel economy than the 2-cycle test procedures. Although, as explained below, to date there has been insufficient information to develop standards based on 5-cycle test procedures, such information could be developed and there is no legal constraint in the CAA to developing such standards. Indeed, section 206(h) provides support for such an approach. Now that automotive manufacturers are using the 5-cycle test procedure for labeling purposes, we anticipate significant amount of data regarding the impact of the 5-cycle test on vehicle CO_2 emissions will be made available to the Agency over the next several years.

However, for the programs analyzed in the Light-duty Vehicle TSD, EPA used the original 2-cycle test. Indeed, data were simply lacking for the efficiencies of most fuel economy control measures as measured by 5-cycle tests. Thus, existing feasibility studies and analyses, such as the 2002 National Academy of Sciences (NAS) and the 2004 Northeast States Center for a Clean Air Future (NESCCAF) studies that examined technologies to reduce CO_2, were based on the 2-cycle test procedures. However, as noted above, we expect that new data regarding the 5-cycle test procedures will be made available and could be considered in future analysis.

It is important to note, however, that all of our benefits inputs, modeling and environmental analyses underlying the potential programs analyzed in the Light-duty Vehicle TSD accounted for the difference between emissions levels as measured by the 2-cycle test and the levels more likely to actually be achieved in real world performance. Thus, EPA applied a 20% conversion factor (2-cycle emissions result divided by 0.8) to convert industry-wide 2-cycle CO_2 emissions test values to real world CO_2 emissions factors. EPA used this industry-wide conversion factor for all of its emission reduction estimates, and calculated such important values as overall emission reductions, overall benefits, and overall cost-effectiveness using these corrected values. In reality, this conversion factor is not uniform across all vehicles. For example, the conversion factor is greater than 20% for vehicles with higher fuel economy/lower CO_2 values and is less than 20% for vehicles with lower fuel economy/higher CO_2 values. But to simplify the technology feasibility analysis, the analysis assumed a uniform conversion factor of 20% for all vehicles. EPA does not believe the overall difference would have a significant effect on the standards because the errors on either side of 20% tend to offset one another.

EPA thus analyzed CO_2 standards based on the 2-cycle test procedures for our analysis to date. EPA would expect to continue to gain additional experience and data on the 5-cycle test procedures used in the labeling program. If EPA determined that analyzing potential CO_2 standards based on these test procedures would result in more robust control of those emissions, we would consider this in future analyses. EPA requests comments on the above test procedure issues, and the relative importance of using the 2-cycle versus the 5-cycle test in any future EPA action to establish standards for light-duty vehicle tailpipe CO_2 emissions.

2. Heavy-Duty Trucks

Like light-duty vehicles, EPA's regulatory authority to address pollution from heavy-duty trucks comes from section 202 of the CAA. The Agency first exercised this responsibility for heavy-duty trucks in 1974. Since that time, heavy-duty truck and diesel engine technologies have continued to improve, and the Agency has set increasingly stringent emissions standards (today's diesel engines are 98% cleaner than those from 1974). Over that same period, freight shipment by heavy-duty trucks has more than doubled. Goods shipped solely by truck account for 74% of the value of all commodities shipped within the United States. Trucked freight is projected to double again over the next two decades, growing from 11.5 billion tons in 2002 to over 22.8 billion tons in 2035.[139] Total truck GHG emissions are expected to grow with this increase in freight.

Reflecting important distinctions between light and heavy-duty vehicles, section 202 gives EPA additional guidelines for heavy-duty vehicle regulations for certain pollutants, including defined regulatory lead time criteria and authority to address heavy-duty engine rebuild practices. The Agency has further used the discretion provided in the CAA to develop regulatory programs for heavy-duty vehicles that reflect their primary function. Key differences between our light-duty and heavy-duty programs include vehicle standards for cars versus engine standards for heavy-duty trucks, gram per distance (mile) standards for cars versus gram per work (brake horsepower-hour) for trucks, and vehicle test procedures for cars versus engine-based tests for trucks. EPA has thus determined that in the heavy-duty sector, the appropriate metric to evaluate performance is per unit of work and that engine design plays a critical role in controlling criteria pollutant emissions. EPA's rules also reflect the nature of the heavy-duty industry with separate engine and truck manufacturers. As EPA considers the best way to address GHG emissions from the heavy-duty sector, we will again be considering the important ways that heavy-duty vehicles differ from light-duty vehicles.

In this section, we will characterize the heavy-duty GHG emissions inventory, broadly discuss the technologies available in the near- and long-term to reduce heavy-duty truck GHG emissions, and discuss potential regulatory options to address these emissions. We invite comment on the issues that are relevant to considering potential GHG emission standards for heavy-duty trucks. In particular, we invite commenters to compare and contrast potential heavy-duty solutions to our earlier discussion of light-duty vehicles and our existing heavy-duty criteria pollutant control program in light of the differences between GHG emissions and traditional criteria air pollutants.

a. Heavy-Duty Truck GHG Emissions

Heavy-duty on-road vehicles emitted 401 million metric tons of CO_2 emissions in 2006, or approximately 19% of the mobile source CO_2 emissions, the largest mobile source sub-category after light-duty vehicles.[140] CO_2 emissions from these vehicles are expected to increase significantly in the future, by approximately 29% between 2006 and 2030.[141]

Diesel powered trucks comprise 91% of the heavy-duty CO_2 emissions, with the remaining 9% coming from gasoline and natural gas engines. Heavy-duty GHG emissions come primarily from two types of applications, combination and single unit trucks. Combination trucks constitute 75% of the total heavy-duty GHG emissions—44% from long-haul and 31% from short-haul operations. Short-haul single unit trucks are the third largest source at 19%. The remaining 5% consists of long-haul single unit trucks; intercity, school, and transit buses; refuse trucks, and motor home emissions.[142]

GHG emissions from heavy-duty trucks are dominated by CO_2 emissions, which comprise approximately 99% of the total, while hydrofluorocarbon and N_2O emissions represent 0.5% and 0.3%, respectively, of the total emissions on a CO_2 equivalent basis.

b. Potential for GHG Emissions Reductions From Heavy-Duty Trucks

Based on the work from EPA's SmartWay Transport Partnership and the 21st Century Truck Partnership, we see a potential for up to a 40% reduction in GHG emissions from a typical heavy-duty truck in the 2015 timeframe, with greater reductions possible looking beyond 2015, through improvements in truck and engine technologies.[143] While highly effective criteria pollutant control has been realized based on engine system regulation alone, the following sections make clear that GHG emissions improvements to truck technology provide a greater potential for overall GHG emission reductions from this sector.

In this section, we will provide a brief summary of the potential for GHG emission reductions in terms of engine technology, truck technology and changes to fleet operations. The public docket for this Advance Notice includes a technical memorandum from EPA staff summarizing this potential in greater detail.[144] In discussing the potential for CO_2 emission reductions, it can be helpful to think of work flow through a truck's system. The initial work input is fuel. Each gallon of diesel fuel has the potential to produce some amount of work and will produce a set amount of CO_2 (about 22 lbs. of CO_2 per gallon of diesel fuel). The engine converts the chemical energy in the fuel to useable work to move the truck. Any reductions in work demanded of the engine by the vehicle or improvements in engine fuel conversion efficiency will lead directly to CO_2 emission reductions. Current diesel engines are about 35% efficient over a range of operating conditions with peak efficiency levels of a little over 40%. This means that approximately one-third of the fuel's chemical energy is converted to useful work and two-thirds is lost to waste heat in the coolant and exhaust. In turn, the truck uses this work output from the engine to overcome vehicle aerodynamic drag (53%), tire rolling resistance (32%), and friction in the vehicle driveline (6%) and to provide auxiliary power for components such as air conditioning and lights (9%).[145] While it may be intuitive to look first to the engine for CO_2 reductions given that only about one-third of the fuel is converted to useable work, it is important to realize that any improvement in vehicle efficiency reduces both the work demanded and also the energy wasted in proportional amounts.

In evaluating the potential to reduce GHG emissions from trucks and operations as a whole, it will be important to develop an appropriate metric to quantify GHG emission reductions. As discussed above, our current heavy-duty regulatory programs measure emissions expressed on a mass per work basis (g/bhp-hr). This approach has proven highly effective at controlling criteria pollutant emissions while normalizing the diverse range of

[139] Government Accountability Office. *Freight Transportation: National Policy and Strategies Can Help Improve Freight Mobility* GAO–08–287. Report to the Ranking Member, Committee on Environment and Public Works, U.S. Senate. January 2008.

[140] Emissions data in this section are from the United States Environmental Protection Agency. *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006.* EPA 430–R–08–005. April 2008.

[141] Growth data in this section is from United States Department of Energy, Energy Information Administration. *Annual Energy Outlook 2008.* #DOE/EIA–0383. April 2008.

[142] Breakdown of emissions data in this section is from United States Environmental Protection Agency. MOVES model. April 8, 2008.

[143] 21st Century Truck Partnership. *Technology Roadmap for the 21st Century Truck Program.* 21CT–001. December 2000. *http://www.doe.gov/bridge.*

[144] Summary of GHG Emission Control Technologies for Heavy-Duty Trucks, Memorandum to Docket XXX, May 2008.

[145] Approximate truck losses at 65 mph from 21st Century Truck Partnership. 21st Century Truck Partnership Roadmap/Technical White Papers: Engine Systems. 21CT–003. December 2006. *http://www.doe.gov/bridge.*

heavy-duty vehicle applications to a single engine-based test metric. While such an approach could be applied to evaluate CO_2 emission reductions from heavy-duty engines, it would not readily provide a mechanism to measure and compare reductions due to vehicle improvements. Hence, we will need to consider other performance metrics such as GHG emissions per ton-mile. We request comment on what types of metrics EPA should consider to measure and express GHG emission rates from heavy-duty trucks.

We discuss below the wide range of engine, vehicle, and operational technologies available to reduce GHG emissions from heavy-duty trucks. Our discussion broadly assesses the availability of these technologies and their GHG emissions reduction potential. We request comment on all aspects of our current assessment summarized here and in more detail in our technical memorandum, including supporting data with regard to technology costs, GHG reduction effectiveness, the appropriate GHG metric to evaluate the technology and the timeframe in which these technologies could be brought into the truck market. More generally, we request comment on the overall GHG emissions reductions that can be achieved by heavy-duty trucks in the 2015 and 2030 timeframes.

i. Engine

The majority of heavy-duty vehicles today utilize turbocharged diesel engines. Diesel engines are more efficient compared to gasoline engines due to the use of higher compression ratios, the ability to run with lean air-fuel mixtures, and the ability to run without a throttle for load control. Modern diesel engines have a peak thermal efficiency of approximately 42%, compared to gasoline engines that have a peak thermal efficiency of 30%. Turbochargers increase the engine's power-to-weight ratio and recover some of the exhaust heat energy to improve the net efficiency of the engine.

Additional engine improvements could increase efficiency through combustion improvements and reductions of parasitic and pumping losses. Increased cylinder pressure, waste heat recovery, and low viscosity lubricants could reduce CO_2 emissions, but are not widely utilized in the heavy-duty industry. Individual improvements have a small impact on engine efficiency, but a combination of approaches could increase efficiency by 20% to achieve a peak engine efficiency of approximately 50%.[146]

Waste heat recovery technologies, such as Rankine bottoming cycle, turbocompounding and thermoelectric materials, can recover and convert engine waste heat to useful energy, leading to improvements in the overall engine thermal efficiency and consequent reduction in CO_2 emissions. We request comment on the potential of these technologies to lower both GHG emissions and overall heavy-duty vehicle operating costs.

In section VI.D below, we discuss the Renewable Fuel Standard (RFS) program and more broadly the overall role of fuel changes to reduce GHG emissions. As we have previously noted, the Agency has addressed vehicle emissions through a systems-based approach that integrates consideration of fuel quality and vehicle or engine emission control systems. For example, removing lead from gasoline and sulfur from diesel fuel has enabled the introduction of very clean gasoline and diesel engine emission control technologies. A systems approach may be a means to address GHG emissions as well. Since 1989, European engine maker Scania has offered an ethanol powered heavy-duty diesel cycle engine with traditional diesel engine fuel efficiency (the current version offers peak thermal efficiency of 43%).[147] Depending on the ethanol production pathway, such an approach could offer a significant reduction in GHG emissions from a life cycle perspective when compared to more traditional diesel fuels. We request comment on the potential for a systems approach considering alternate fuel and engine technologies to reduce GHG emission from heavy-duty trucks. We also request comment on how EPA might structure a program to appropriately reflect the potential for such GHG emission reductions.

ii. Vehicle systems

An energy audit of heavy-duty trucks shows that vehicle efficiency is strongly influenced by systems outside of the engine. As noted above, aerodynamics, tire rolling resistance, drivetrain, and weight are areas where technology improvements can significantly reduce GHG emissions through reduced energy losses. The fuel savings benefits of many of these technologies often offset the additional costs. Opportunities for HFC and additional CO_2 reductions are available through improved air conditioning systems.

For a typical combination tractor-trailer truck traveling at 65 mph, energy losses due to aerodynamic drag can total over 21% of the total energy consumed.[148] A recent study between industry and the federal government demonstrated that reducing the tractor-trailer gap and adding trailer side skirts, trailer boat tails, and aerodynamic mirrors can reduce aerodynamic drag by as much as 23%. If aerodynamic drag were reduced from 21% to 15% (a 23% reduction), GHG emissions at 65 mph would be reduced by almost 12%.[149] The cost of aerodynamic equipment installed on a new or existing trailer is generally paid back within two years.[150] As aerodynamic designs become more sophisticated, more consistency in how aerodynamics is measured is needed. There is no single, consistent approach used by industry to measure the coefficient of aerodynamic drag of heavy trucks. As a result, it is difficult for fleets to understand which truck configurations have the lowest aerodynamic drag. We request comment on the best approach to evaluate aerodynamic drag and the impact of aerodynamic drag on truck GHG emissions.

For a typical combination tractor-trailer truck traveling at 65 mph, energy losses due to tire rolling resistance can total nearly 13% of the total energy consumed.[151] Approximately 80–95% of the energy losses from rolling resistance occur as the tire flexes and deforms when it meets the road surface, due to viscoelastic heat dissipation in the rubber. For heavy trucks, a 10% reduction in rolling resistance can reduce GHG emissions by 1–3%.[152] Improvements of this magnitude and greater have already been demonstrated, and continued innovation in tire design

[146] 21st Century Truck Partnership. 21st Century Truck Partnership Roadmap/Technical White Papers: Engine Systems. 21CT–003. December 2006. *http://www.doe.gov/bridge*.

[147] Green Car Congress. Scania Extending Heavy-Duty Ethanol Engine Technology to Trucks. April 15, 2008. *http://www.greencarcongress.com/2008/04/scania-extendin.html* (April 30, 2008).

[148] 21st Century Truck Partnership. *Technology Roadmap for the 21st Century Truck Program.* 21CT–001. December 2000. *http://www.doe.gov/bridge*.

[149] United States Department of Energy, Lawrence Livermore National Laboratory. Working Group Meeting on Heavy Vehicle Aerodynamic Drag: Presentation, Summary of Contents and Conclusion. UCRL–TR–214683. May 2005.

[150] Bachman, L. Joseph,; Anthony Erb; Cheryl Bynum. Effect of Single Wide Tires and Trailer Aerodynamics on Fuel Economy and NO_x Emissions of Class 8 Line-Haul Tractor-Trailers. SAE Paper 2005–01–3551. 2005.

[151] 21st Century Truck Partnership. *Technology Roadmap for the 21st Century Truck Program.* 21CT–001. December 2000. http://www.doe.gov/bridge.

[152] 21st Century Truck Partnership. *Technology Roadmap for the 21st Century Truck Program. 21CT–001.* December 2000. http://www.doe.gov/bridge.

has the potential to achieve even larger improvements in the future. Specifying single wide tires on a new combination truck can have a lower initial cost and lead to immediate fuel savings.[153] Despite the well-understood benefits of lower rolling resistance tires, manufacturers differ in how they assess tire rolling resistance. We seek comment on the potential for low rolling resistance tires to lower GHG emissions, the need for consistent protocols to measure tire rolling resistance, and the need for a common ranking or rating system to provide tire rolling resistance information to the trucking industry.

Hybrid technologies, both electric and hydraulic, offer significant GHG reduction potential. The hybrid powertrain is a combination of two or more power sources: an internal combustion engine and a second power source with an energy storage and recovery device. Trucks operating under stop-and-go conditions, such as urban delivery trucks and refuse trucks, lose a significant amount of energy during braking. In addition, engines in most applications are designed to perform under a wide range of requirements and are often oversized for the majority of their requirements. Hybrid powertrain technologies offer opportunities to capture braking losses and downsize the engine for more efficient operation. We invite comment on the potential of GHG reductions from hybrids in all types of heavy-duty applications.

Currently most truck auxiliaries, such as the water pump, power steering pump, air conditioning compressor, air compressor and cooling fans, are mechanical systems typically driven by belts or gears off of the engine driveshaft. The auxiliary systems are inefficient because they produce power proportionate to the engine speed regardless of the actual vehicle requirements and require conversion of fuel energy to electrical or mechanical work. If systems were driven by electrical systems they could be optimized for actual requirements and reduced energy consumption. We request comment on the potential for these auxiliary systems to lower GHG emissions from heavy-duty trucks.

Air conditioning systems are responsible for GHG emissions from refrigerant leakage and from the exhaust emissions generated by the engine to produce the load required to run the air conditioning. The emissions due to leakage can be reduced by the use of improved sealing designs, low-permeation hoses, and refrigerant substitution. Replacing today's refrigerant, HFC–134a, which has a high global warming potential (GWP=1,300), with HFC–152a (GWP=120) or CO_2 (GWP=1) reduces the impact of the air conditioning leakage on the environment.[154] The load requirements of the air conditioning system can be reduced through the use of improved condensers, evaporators, and variable displacement compressors. We request comment on the impact of air conditioning improvements on GHG reductions in heavy-duty trucks.

iii. Operational

The operation of the truck, including idle time and vehicle speed, also has significant impact on the GHG emissions. Technologies that improve truck operation exist and provide benefits to owners through reduced fuel costs.

Idling trucks emit a significant amount of CO_2 emissions (as well as criteria pollutants). On average, a typical truck will emit 18 pounds of CO_2 per hour of idling.[155] Long haul truck idle reduction technologies can reduce main engine idling while still meeting cab comfort needs. Some idle reduction technologies have no upfront cost for the truck owner and hence represent an immediate savings in operating costs with lower GHG emissions. Other idle reduction technologies pay back within three years.[156] In addition to providing information about these systems, EPA seeks comment on whether it should work with stakeholders to develop a formal evaluation protocol for the effectiveness, cost, durability, and operability of various idle-reduction technologies.

Vehicle speed is the single largest operational factor affecting CO_2 emissions from large trucks. A general rule of thumb is that every mph increase above 55 mph increases CO_2 emissions by more than 1%. Speed limiters are generally available on new trucks or as a low-cost retrofit, and assuming a five mph decrease in speed, payback occurs within a few months.[157]

Automatic tire inflation systems maintain proper inflation pressure, and thereby reduce tire rolling resistance. Studies indicate that automatic tire inflation systems result in about 0.5 to 1% reduction of CO_2 emissions for a typical truckload or less-than-truckload over-the-road trucking fleet.[158] Automatic tire inflation systems can pay back in less than four years, assuming typical underinflation rates.

All of the technologies summarized here can provide real GHG reductions while providing value to the truck owner through reduced fuel consumption. We request comment on the potential of these specific technologies and on any other technologies that may allow vehicle operators to reduce overall GHG emissions.

c. Regulatory Options for Reducing GHGs From Heavy-Duty Trucks

In developing any GHG program for heavy-duty vehicles, we would rely on our past experience addressing the multifaceted characteristics of this sector. In the following sections, we discuss three potential regulatory approaches for reducing GHG emissions from the heavy-duty sector. We request comments on all aspects of these options. We also encourage commenters to suggest other approaches that EPA should consider to address GHG emissions from heavy-duty trucks, recognizing that there are some important differences between criteria air pollutants and GHG emissions.

The heavy-duty engine manufacturers have made great strides in reducing criteria pollutant emissions. We know these same manufacturers have already achieved GHG emission reductions through the introduction of more efficient engine technologies, and have the potential to realize even greater reductions. We estimate that approximately 30% of the overall GHG emission reduction potential from this sector comes from engine improvements, 60% from truck improvements, and 10% from operational improvements based on the technologies outlined in the 21st Century Truck roadmap and *Best Practices Guidebook for GHG Emissions Reductions in Freight Transportation*. We request comment on our assessment

[153] United States Environmental Protection Agency. *A Glance at Clean Freight Strategies: Single Wide-Based Tires*. EPA420–F–04–004. February 2004.

[154] Frey, H. Christopher and Po-Yao Kuo. Best Practices Guidebook for GHG Emissions Reductions in Freight Transportation. Prepared for U.S. Department of Transportation via Center for Transportation and the Environment. October 2007. Pages 26–27.

[155] United States Environmental Protection Agency. *A Glance at Clean Freight Strategies: Idle Reduction*. EPA420–F–04–009. February 2004.

[156] EPA SmartWay Transport Partnership, *Technology Package Savings Calculator, http://www.epa.gov/smartway/calculator/loancalc.htm*.

[157] American Trucking Associations *Petition to National Highway Traffic Safety Administration*, (Docket NHTSA–2007–26851, Document ID NHTSA–2007–26851–0005), October 20, 2006, and American Trucking Associations Comment to Docket (Docket NHTSA–2007–26851, Document ID NHTSA–2007–26851–3708), March 27, 2007.

[158] mission reduction and payback information from United States Environmental Protection Agency. *A Glance at Clean Freight Strategies: Automatic Tire Inflation Systems*. EPA420–F–04–010. February 2004.

of the relative contributions of engine, truck, and operational technologies.

The first approach we could consider would be a regulatory program based on an engine CO_2 standard or weighted GHG standard including N_2O and methane. One advantage to this option is its simplicity because it preserves the current regulatory and market structures. The heavy-duty engine manufacturers are familiar with today's certification testing and procedures. They have facilities, engine dynamometers, and test equipment to appropriately measure emissions. The same equipment and test procedures can be, and already are, used to measure CO_2 emissions. Measuring and reporting N_2O and methane emissions would require relatively simple additions to existing test cell instrumentation. We request comment regarding issues that EPA should consider in evaluating this option and the most appropriate means to address the issues raised. We recognize that an engine-based regulatory structure would limit the potential GHG emission reductions compared to programs that include vehicle technologies and the crediting of fleets for operational improvements. The other approaches considered below would have the potential to provide greater GHG reductions by providing mechanisms to account for vehicle and fleet operational changes.

Recognizing that GHG emissions could be further reduced through improvements to both engines and trucks, we request comment on an alternative test procedure that would include vehicle aspects in an engine-based standard. This option would still be based on an engine standard. However, it would provide a mechanism to adjust the engine test results to account for improvements in vehicle design. For example, if through an alternate test procedure (e.g., a vehicle chassis test) a hybrid truck were shown to reduce GHG emissions by 20%, under this option an engine based GHG test result could be adjusted downward by that same 20%. In this way, we could reflect a range of vehicle or perhaps even operational changes into an engine based regulatory program. In fact, we are already developing such an approach for a vehicle based change to provide a better mechanism to evaluate criteria emissions from hybrid vehicles.[159] We are currently working with the heavy-duty industry to develop these new alternate test procedures and protocols. These new procedures could provide a foundation for regulatory programs to address GHG emissions as well. We request comment on the potential for alternate test procedures to reflect vehicle technologies in an engine based GHG regulatory program.

A second potential regulatory option for heavy-duty truck GHG emissions would be to follow a model very similar to our current light-duty vehicle test procedures. Each truck model could be required to meet a GHG emissions standard based on a specified drive cycle. The metric for the standard could be either a weighted GHG gram/mile with prescribed test weight and payload or GHG gram/payload ton-mile to recognize that heavy-duty trucks perform work. This option would reflect an important change from our current regulatory approach for most heavy-duty vehicles by direct regulation of trucks (and therefore truck manufacturers) rather than engines.[160] As discussed earlier in this section, we have historically regulated heavy-duty engines rather than vehicles reflecting in part the heavy-duty industry structure and in part the preeminence of engine technology in controlling NO_X and PM emissions. Clearly truck design plays a much more important role in controlling GHG emissions due to significant energy losses through aerodynamic drag and tire rolling resistance, and therefore, this option directly considers the regulation of heavy-duty trucks. We request comment on all aspects of this option including the appropriate test metric, the need to develop new test procedures and potential approaches for grouping heavy-duty vehicles into subcategories for GHG regulatory purposes.

As described earlier, there are a number of technologies and operational changes that heavy-duty fleet operators can implement to reduce both their overall operating costs and their GHG emissions. Therefore, a third regulatory option that could be considered as a complement to those discussed previously would be to allow heavy-duty truck fleets to generate GHG emissions credits for applying technologies to reduce GHG emissions, such as idle reduction, vehicle speed limiters, air conditioning improvements, and improved aerodynamic and tire rolling resistance. In order to credit the use of such technologies, EPA would first need to develop procedures to evaluate the potential for individual technologies to reduce GHGs. Such a procedure could be based on absolute metrics (g/mile or g/ton-mile) or relative metrics (percent reductions). We would further need to address a wide range of complex potential issues including mechanisms to ensure that the reductions are indeed realized in use and that appropriate assurance of such future actions could be provided at the time of certification, which occurs prior to the sale of the new truck. Such a regulatory program could offer a significant opportunity to reward trucking fleets for their good practices while providing regulatory flexibility to help address the great diversity of the heavy-duty vehicle sector. It would not lead to any additional GHG reductions, however, as the credits generated by the fleet operators would be used by the engine or vehicle makers to comply with their standards. We welcome comments on the merits and issues surrounding potential approaches to credit operational and technical changes from heavy-duty fleets to reduce GHG emissions.

In considering the regulatory options available, we are cognizant of the significant burden that could result if these programs were to require testing of every potential engine and vehicle configuration related to its GHG emissions. Therefore, we have been following efforts in Japan to control GHG emissions through a regulatory program that relies in part on engine test data and in part on vehicle modeling simulation. As currently constructed, Japan's heavy-duty fuel efficiency regulation considers engine fuel consumption, transmission type, and final drive ratio in estimating overall GHG emissions. Such a modeling approach may be a worthwhile first step and may be further improved by including techniques to recognize design differences in vehicle aerodynamics, tire rolling resistance, weight, and other factors. We request comment on the appropriateness of combining emissions test data with vehicle modeling results to quantify and regulate GHG emissions. In particular, we welcome comments addressing issues including model precision, equality aspects of model based regulation, and the ability to standardize modeling inputs.

The regulatory approaches that we have laid out in this section reflect incremental steps along a potential path to fully address GHG emissions from this sector. These approaches should not be viewed as discrete options but rather as potential building blocks that could be mixed and matched in an

[159] As discussed in section VI.C.2, we have also applied a similar alternate test procedure approach in our new locomotive standards (see 40 CFR 1033.530(h)).

[160] For some years EPA has allowed gasoline and other non-diesel vehicle manufactures to certify to and comply with a vehicle based standard as compared to en engine based standard, at their option. See, e.g., 40 CFR 86.005–10.

overall control program. Given the potential for significant burden, EPA is also interested in considering how flexibilities such as averaging, banking, and/or credit trading that may help to reduce costs may be built into any of the regulatory options discussed above. We request comment on all of the approaches described in this section and the potential to implement one or more of these approaches in a phased manner to capture the more straightforward approaches in the near-term and the more complex approaches over a longer period.

3. Highway Motorcycles

The U.S. motorcycle fleet encompasses a vast array of types and styles, from small and light scooters with chainsaw-sized engines to large and heavy models with engines as big as those found in many family sedans. In 2006 approximately 850,000 highway motorcycles were sold in the U.S., reflecting a near-quadrupling of sales in the last ten years. Even as motorcycles gain in popularity, their overall GHG emissions remain a relatively small fraction of all mobile source GHG emissions. Most motorcycles are used recreationally and not for daily commuting, and use is seasonally limited in much of the country. For these reasons and the fact that the fleet itself is relatively small, total annual vehicle miles traveled for highway motorcycles is about 9.5 billion miles (as compared to roughly 1.6 trillion miles for passenger cars).[161]

The Federal Highway Administration reports that the average fuel economy for motorcycles in 2003 was 50 mpg, almost twice that of passenger cars in the same time frame. However, motorcycles are generally designed and optimized to achieve maximum performance, not maximum efficiency. As a result, many high-performance motorcycles have fuel economy in the same range as many passenger cars despite the smaller size and weight of motorcycles. Recent EPA emission regulations are expected to reduce fuel use and hence GHG emissions from motorcycles by: (1) Leading manufacturers to increase the use of electronic fuel injection (replacing carburetors); (2) reducing permeation from fuel lines and fuel tanks; and (3) eliminating the use of two-stroke engines in the small scooter category.[162]

There may be additional opportunities for further reductions in GHG emissions. Options available to manufacturers may include incorporating more precise feedback fuel controls; controlling enrichment on cold starts and under load by electronically controlling choke operation; allowing lower idle speeds when the opportunity exists; optimizing spark for fuel and operating conditions through use of a knock sensor; and, like light-duty vehicles, reducing the engine size and incorporating a turbo-charger. The cost of these fuel saving and GHG reducing technologies may be offset by the fuel savings realized over the lifetime of the motorcycle.

We request comment on information on what approaches EPA should consider for potential further reductions in GHG emissions from motorcycles. We also request comment and data regarding what technologies may be applicable to achieve further GHG reductions from motorcycles.

C. Nonroad Sector Sources

As discussed previously, CAA section 213 provides broad authority to regulate emissions from a wide array of nonroad engines and vehicles,[163] while CAA section 211 provides authority to regulate fuels and fuel additives from both on-highway and nonroad sources and CAA section 231 authorizes EPA to establish emissions standards for aircraft. Collectively, the Title II nonroad and fuel regulation programs developed by EPA over the past two decades provide a possible model for how EPA could structure a long-term GHG reduction program for nonroad engines and vehicles, fuels and aircraft.

In this section, we first review and request comment on a number of petitions received by EPA requesting action to regulate GHG emissions from these sources and we highlight the similarities and key issues raised in those petitions. We invite comment on all of the questions and issues raised in these petitions. For each of three primary groupings, nonroad, marine, and aircraft, we then discuss and seek comment on the GHG emissions from these sources and the opportunities to reduce GHG emissions through design and operational changes.

1. Petition Summaries

Since the *Massachusetts* decision, EPA has received seven additional petitions requesting that we make endangerment findings and undertake rulemaking procedures using our authority under CAA sections 211, 213 and 231 to regulate GHG[164] emissions from fuels, nonroad sources, and aircraft. The petitioners represent states, local governments, environmental groups, and nongovernmental organizations (NGO) including the states of California, New Jersey, New Mexico, Friends of the Earth, NRDC, OCEANA, International Center for Technology Assessment, City of New York, and the South Coast Air Quality Management District. Copies of these seven petitions can be found in the docket for this Advance Notice. Following is a brief summary of these petitions. We request comment on all issues raised by the petitioners.

a. Marine Engine and Vessel Petitions

The Agency has received three petitions to reduce GHG emissions from ocean-going vessels (OGVs). California submitted its petition on October 3, 2007. A joint petition was filed on the same day by EarthJustice on behalf of three environmental organizations: Oceana, Friends of the Earth and the Center for Biological Diversity (''Environmental Petitioners''). A third petition was received from the South Coast Air Quality Management District (SCAQMD) on January 10, 2008.

The California petition requests that EPA immediately begin the process to regulate GHG emissions from Category 3 powered OGVs.[165] According to the petition, the Governor of California has already recognized that, ''California is particularly vulnerable to the impacts of climate change,'' including the negative impact of increased temperature on the Sierra snowpack, one of the State's primary sources of water, and the further exacerbation of California's air quality problems.[166] The petition outlines the steps California has already taken to reduce its own contributions to global warming and states that it is petitioning the Administrator to take action to regulate GHG emissions from

[161] ''Highway Statistics 2003,'' U.S. Department of Transportation, Federal Highway Administration, Table VM–1, December 2004.

[162] See 69 FR 2398, January 15, 2004.

[163] The Act does not define ''vehicle'', but we have interpreted section 213 from its inception to include the broad array of equipment, machines, and vessels powered by nonroad engines, including those that are not self-propelled, such as portable power generators. In keeping with common usage, we typically use the generic terms ''equipment'', ''machine'', or ''application'', as well as the more application-specific terms ''vehicle'' and ''vessel'', to refer to these units, as appropriate.

[164] While petitioners vary somewhat in their definition of GHGs, collectively they define carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, water vapor, sulfur hexaflouride, and soot or black carbon as GHGs.

[165] A category 3 vessel is one where the main propulsion engine(s) have a per-cylinder displacement of more than 30 liters.

[166] State of California, Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Ocean—Going Vessels, page3, October 3, 2007 (''California Petition'').

OGVs because it believes national controls will be most effective.

California makes three key points in its petition. First, California claims that EPA has clear authority to regulate OGV GHG emissions under CAA section 213(a)(4). The State points out that the ''primary substantive difference'' between CAA section 202(a)(1), which the Supreme Court found authorizes regulation of GHGs emissions from new motor vehicles upon the Administrator making a positive endangerment finding, and section 213 is that section 202(a)(1) requires regulation if such an endangerment finding is made while section 213(a)(4) authorizes, but does not require, EPA to regulate upon making the requisite endangerment finding. But petitioner states that EPA's discretion to decide whether to regulate OGVs under section 213(a)(4) is constrained in light of the overall structure and purpose of the CAA. Citing the *Massachusetts* decision, California asserts that the Supreme Court has ''set clear and narrow limits on the kinds of reasons EPA may advance for declining to regulate significant sources of GHGs''.

The second claim California makes is that international law does not bar regulation of GHG emissions from foreign-flagged vessels by the U.S. California asserts that U.S. laws can operate beyond U.S. borders (referred to as extra-territorial operation of laws) when the conduct being regulated affects the U.S. and where Congress intended such extra-territorial application.[167] Petitioner believes that such application of the CAA is both ''permissible and essential in this case'' because to effectively control GHG emissions from shipping vessels, the EPA must regulate foreign-flagged vessels since they comprise 95% of the fleet calling on U.S. ports.[168] Petitioner cites two other instances where the U.S. has regulated foreign-flagged vessels. First, in *Specto* v. *Norwegian Cruiseline.* 545 U.S. 119 (2005), the Supreme Court held that the Americans with Disabilities Act (ADA) could be applied to foreign-flagged cruise ships that sailed from U.S. ports as long as the required accommodations for disabled passengers did not require major, permanent modification to the ships involved. Second, the National Park Service recently imposed air pollutant emissions controls on cruise ships, including foreign-flagged cruise ships that sail off the coast from Glacier Bay National Park, Alaska. The petitioner points out that in this case they did so to protect and preserve the natural resources of the Park, which is analogous to California's reasons for why EPA must regulate GHG emissions from foreign-flagged vessels.[169]

The third claim raised in California's petition is that technology is currently available to reduce GHG emissions from these vessels, either through NO_X reductions or by reducing fuel consumption. Options include, using marine diesel fuel oil instead of bunker fuel, using selective catalytic reductions and exhaust gas recirculation or by reducing speed. Petitioner states that the Clean Air Act was intended to be a technology-forcing statute and that EPA can and should consider OGV control measures that force the development of new technology.

California requests three forms of relief: (1) That EPA make a finding that carbon dioxide emissions from new marine engines and vessels significantly contribute to air pollution which may reasonably be anticipated to endanger public health and welfare; (2) that EPA use its CAA section 213(a)(4) authority to adopt regulations specifying emissions standards for CO_2 emissions from these engines and vessels; and (3) that EPA adopt regulations specifying fuel content or type necessary to carry out the emission standards adopted for new marine engines.

The second group requesting EPA action on OGVs, Environmental Petitioners, believes that climate change threatens public health and welfare and that marine shipping vessels make a significant contribution to GHG emissions, and that therefore EPA should quickly promulgate regulations requiring OGVs to meet emissions standards by ''operating in a fuel-efficient manner, using cleaner fuels and/or employing technical controls, so as to reduce emissions of carbon dioxide, nitrous oxide, and black carbon.'' These petitioners further state that EPA should also control ''the manufacture and sale of fuels used in marine shipping vessels by imposing fuel standards'' to reduce GHG emissions.[170]

The Environmental Petitioners focus their petition on four specific arguments. First, like California, they assert that OGVs play a significant role in global climate change. They focus on the emissions of four pollutants: CO_2, NO_X, N_20, and black carbon (also known as soot). Petitioners cite numerous studies that they assert document that the impact of these GHG emissions are significant today and that industry trends indicate these emissions will grow substantially in future decades. Second, petitioners lay out a detailed legal argument asserting that EPA has clear authority to regulate these four air pollutants from OGVs, and contending that the *Massachusetts* decision must guide EPA's actions as it decides how to regulate GHG emissions from OGVs. Third, petitioners discuss a number of regulatory measures that can effectively reduce GHG emissions from OGVs and which EPA could adopt using its regulatory authority under CAA section 213(a)(4), including measures requiring restrictions on vessel speed; requiring the use of cleaner fuels in ships and other technical and operations measures petitioners believe are relatively easy and cost-effective. Lastly, petitioners assert that the CAA section 213 provides EPA with clear authority to regulate GHG emissions from both new and remanufactured OGV engines as well as from foreign-flagged vessels.

SCAQMD petition also requests Agency action under section 213 of the CAA and states that it has a strong interest in the regulation of GHG emissions from ships including emissions of NO_X, PM, and CO_2. SCAQMD states that the net global warming effect of NO_X emissions is potentially comparable to the climate effect from ship CO_2 emissions and that PM emissions from ships in the form of black carbon can also increase climate change.[171] Finally, because international shipping activity is increasing yearly, SCAQMD asserts that if EPA dos not act quickly, future ship pollution will become even worse, increasing both ozone and GHG levels in the South Coast area of California. As with other petitioners, SCAQMD states that there is a clear legal basis for EPA to regulate ships GHG emissions under section 213(a)(4).

SCAQMD makes two additional assertions in its petition which mirror the California and Environmental Petitions. First, EPA can avoid regulation of ship GHG emissions only if it determines that ''endangerment'' can be avoided without regulation of ship emissions.[172] Second, SCAQMD believes that EPA has the authority to regulate foreign-flagged vessels under at

[167] Petitioners cite *EEOC* v. *Arabian American Oil Co.,* 499 U.S. 244 (1991) (''Aramco'') as supporting this principle.

[168] California Petition, page 13.

[169] Petitioners cite regulations found at 36 CFR 13.65 (b)(4) and 61 FR 27008, at 27011.

[170] Environmental Petition, Petition for Rulemaking Under the Clean Air Act to Reduce the Emissions of Air Pollutants from Marine Shipping Vessels that Contribute to Global Climate Change, page 2, October 3, 2007.

[171] SCAQMD, Petition for Rulemaking under the Clean Air Act to Reduce Global Warming Pollutants from Ships, page 2, January 10, 2008.

[172] SCAQMD Petition, page 9.

least two circumstances: (1) For a foreign owned and operated vessel, where the regulation(s) would not interfere with matters that ''involve only the internal order and discipline of the vessel,'' *Spector* v. *Norwegian Cruise Lines,* 545 U.S. 119, 131 (2005), and (2) where the vessel is owned and operated by a U.S. corporation, even if it is foreign-flagged.[173]

SCAQMD requests two types of relief: (1) That EPA, within six months of receiving its petition, make a positive endangerment determine for CO_2, NO_X, and black carbon emissions from new marine engines and vessels ''because of their contribution to climate change;'' and (2) that EPA promulgate regulations under CAA section 213 (a)(4) to obtain the maximum feasible reductions in emissions of these pollutants. We invite comment on all elements of the petitioners' assertions and requests.

b. Aircraft Petitions

The Agency has received two petitions to reduce GHG emissions from aircraft.[174] The first petition was submitted on December 4, 2007, by California, Connecticut, New Jersey, New Mexico, Pennsylvania's Department of Environmental Protection, the City of New York, the District of Columbia, and the SCAQMD (''State Petitioners''). A second petition was filed on December 31, 2007, by Earthjustice on behalf of four environmental organizations: Friends of the Earth, Oceana, Center for Biological Diversity and NRDC (''Environmental Petitioners'').

All petitioners request that EPA exercise its authority under section 231(a) of the CAA to regulate GHG emissions from new and existing aircraft and/or aircraft engine operations, after finding that aircraft GHG emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.[175] Petitioners suggest that these regulations could allow compliance through technological controls, operational measures, emissions fees, or a cap-and-trade system.

Both petitions discuss how aircraft engines emit GHG emissions which they assert have a disproportionate impact on climate change. Petitioners cite a range of scientific documents to support their statements. They assert that ground-level aircraft NO_X, a compound they identify as a GHG, contributes to the formation of ozone, a relatively short-lived GHG. NO_X emissions in the upper troposphere and tropopause, where most aircraft emissions occur, result in greater concentrations of ozone in those regions of the atmosphere compared to ground level ozone formed as a result of ground level aircraft NO_X emissions. Petitioners contend that aircraft emissions contribute to climate change also by modifying cloud cover patterns. Aircraft engines emit water vapor, which petitioners identify as a GHG that can form condensation trails, or ''contrails,'' when released at high altitude. Contrails are visible line shaped clouds composed of ice crystals that form in cold, humid atmospheres. Persistent contrails often evolve and spread into extensive cirrus cloud cover that is indistinguishable from naturally occurring cirrus clouds. The petitioners state that over the long term this contributes to climate change.

State Petitioners highlight the effects climate change will have in California and the City of New York as well as efforts underway in both places to reduce GHG emissions. They argue that without federal government regulation of GHG emissions from aircraft, their efforts at mitigation and adaptation will be undermined. Both petitioners urge quick action by EPA to regulate aircraft GHG emissions since these emissions are anticipated to increase considerably in the coming decades due to a projected growth in air transport both in the United States and worldwide. They cite numerous reports to support this point, including an FAA report, which indicates that by 2025 emissions of CO_2 and NO_X from domestic aircraft are expected to increase by 60%.[176]

We request comment on all issues raised in the petitions, particularly on two assertions made by Environmental Petitioners: (1) That technology is available to reduce GHG emissions from aircraft allowing EPA to take swift action, and (2) that EPA has a mandatory duty to control GHG emissions from aircraft and can fulfill this duty consistent with international law governing aircraft. In addition, we invite comment on the petitioners' assessment of the impact of aircraft GHG emissions on climate change, including the scientific understanding of these impacts, and whether aircraft GHG emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.

With regard to technology, petitioners highlight existing and developing aviation procedures and technologies which could reduce GHG emissions from new and existing aircraft. For example, they point to various aviation operations and procedures including minimizing engine idling time on runways and employing single engine taxiing that could be undertaken by aircraft to reduce GHG emissions. Petitioners also discuss the availability of more efficient aircraft designs to reduce GHG emissions, such as reducing their weight, and they suggest that using alternative fuels could also reduce aviation GHG emissions.

Environmental Petitioners contend that once EPA makes a positive endangerment finding for aircraft GHG emissions, EPA has a mandatory duty to act, but that the potential regulatory responses available to EPA are quite broad and should be considered for all classes of aircraft, including both new and in-use aircraft and aircraft engines. In addition, petitioners argue that EPA's authority to address GHG emissions from aircraft is consistent with international law-in particular the Convention on International Civil Aviation (the ''Chicago Convention'')—and that the United States'' obligations under the Convention do not constrain EPA's authority to adopt a program that addresses aviation's climate change impacts, including those from foreign aircraft.

The State and Environmental Petitioners each request the following relief: (1) That EPA make an explicit finding under CAA section 231(a)(2)(A) that GHG emissions from aircraft cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; (2) that EPA propose and adopt standards for GHG emissions from both new and in-use aircraft as soon as possible; (3) that EPA adopt regulations that allow a range of compliance approaches, including emissions limits, operations practices and/or fees, a cap-and-trade system, as well as measures that are more near-

[173] SCAQMD Petition, page10.

[174] While aircraft engines are not ''nonroad engines'' as defined in CAA section 216(10) and aircraft are not ''nonroad vehicles'' as defined in CAA section 216(11), such that aircraft could be subject to regulation under CAA section 213, for organizational efficiency we include aircraft in this ''Nonroad Sector Sources'' section of today's notice.

[175] Petitioners maintain that aircraft engine emissions of CO_2, NO_X, water vapor, carbon monoxide, oxides of sulfur, and other trace components including hydrocarbons such as methane and soot contribute to global warming and that in 2005, aircraft made up 3% of U.S. CO_2 emissions from all sectors, and 12% of such emissions from the transportation sector. States of California *et al*, Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Aircraft, page 11, December 4, 2007, and Friends of the Earth *et al.*, Petition for Rulemaking under the Clean Air Act to Reduce the Emissions of Air Pollutants from Aircraft that Contribute to Global Climate Change, pages 6–7, December 31, 2007.

[176] FAA, Office of Environment and Energy, *Aviation and Emission: A Primer,* January 2005, page 10, available at *http://www.faa.gov/regulations_policies/policy_guidance/envir_policy/media/aeprimer.pdf.*

term, such as reduced taxi time or use of ground-side electricity measures. The Environmental Petitioners' also request that EPA issue standards 90 days after proposal. We invite comment on all elements of the petitioners' assertions and requests, as well as the scientific and technical basis for their assertions and requests.

c. Nonroad Engine and Vehicle Petitions

On January 29, 2008, EPA received two petitions to reduce GHG emissions from nonroad engines and vehicles. The first petition was submitted by California, Connecticut, Massachusetts, New Jersey and Oregon and Pennsylvania's Department of Environmental Protection (''State Petitioners''). The second petition was submitted by the Western Environmental Law Center on behalf of three nongovernmental organizations: the International Center for Technology Assessment, Center for Food Safety, and Friends of the Earth (''NGO Petitioners'').

Both petitions request that EPA exercise its authority under CAA section 213(a)(4) to adopt emissions standards to control and limit GHG emissions from new nonroad engines excluding aircraft and vessels. Both petitions seek EPA regulatory action on a wide range of nonroad engines and equipment, which the petitioners believe, contribute substantially to GHG emissions, including outdoor power equipment, recreational vehicles, farm and construction machinery, lawn and garden equipment, logging equipment and marine vessels.[177]

The State Petitioners, mirroring the earlier State petitions on ocean-going vessels and aircraft, describe the harms which they believe will occur due to climate change, including reduced water supplies, increased wildfires, and threats to agricultural outputs in California; loss of coastal wetlands, beach erosion, saltwater intrusion of drinking water in Massachusetts and Connecticut; and similar harms to the Pennsylvania, New Jersey and Oregon. The petition highlights actions that California has already taken to reduce its own contributions to global warming but points out that only EPA has authority to regulate emissions from new farm and construction equipment under 175 horsepower, ''which constitutes a sizeable portion of all engines in this category.* * * ''[178]

The State Petitioners present three claims which, they believe compel EPA action to reduce GHG emissions from nonroad sources. First, petitioners claim that GHG emissions from these sources are significant.[179] Petitioners cite various reports documenting national GHG emissions from a broad range of nonroad categories which, they contend, provide evidence that nonroad GHG emissions are already substantial, and will continue to increase in the future. Petitioners, also cite additional inventory reports that nonroad GHG emissions already exceed total U.S. GHG emissions from aircraft as well as from boats and ships, rail, and pipelines combined.[180] Petitioner's present California nonroad GHG emissions data which, they contend, mirror national GHG emission trends for nonroad engines and bolster their claim that GHG emissions from the nonroad sector, as a whole, are significant and are substantial for three categories: Construction and mining equipment, agricultural, and industrial equipment.

State Petitioners' second claim is that EPA has the authority to regulate GHG emissions from nonroad sources, although they acknowledge that CAA section 213(a)(4) is discretionary. Petitioners contend this discretion is not unlimited and that the structure of the CAA must guide EPA's actions. Petitioners maintain that since the CAA prohibits States from undertaking their traditional police power role in regulating pollution from new construction or agricultural sources under 175 horsepower, ''Congress has implicitly invested EPA with the responsibility to act to prevent [these] harmful emissions.'' The third and final claim raised by State Petitioners is that both physical and operational controls are currently available to achieve fuel savings and/or to limit GHG emissions. Such measures include idle reduction, electrification of vehicles, the use of hybrid or hydraulic-hybrid technology, as well as use of ''cool paints'' that reduce the need for air conditioning.

NGO petitioners make three similar claims in their petition. First, petitioners argue that serious public health and environmental consequences are projected for this century unless effective and timely action is taken to mitigate climate change. Petitioners further contend that GHG emissions from nonroad engines and vehicles are responsible for a significant and growing amount of GHG emissions and, like the State petitioners previously, they highlight three nonroad sectors responsible for a large portion of these GHG emission—construction, mining, and agriculture.

Petitioners' second claim is that once EPA renders a positive endangerment determination under CAA section 202 for motor vehicles and engines, this finding should also satisfy the endangerment determination required under CAA section 213(a)(4) for nonroad engines. EPA's discretion under CAA section 213(a)(4) is limited, petitioners assert, by the relevant statutory considerations, as held by the Supreme Court in *Massachusetts* v. *EPA*, so that the Agency ''can decline to regulate nonroad engine and vehicle emissions only if EPA determines reasonably that such emissions do not endanger public health or welfare, or else, taking into account factors such as cost, noise, safety and energy, no such regulations would be appropriate.''[181] Like State petitioners, NGOs point out that because the CAA restricts states' ability to regulate pollution from new construction or farm vehicles and engines under 175 horsepower, Congress ''implicitly invested EPA with unique responsibility to act in the states'' stead so as to prevent such harmful emissions.'' Petitioners also argue that the National Environment Policy Act (NEPA) section 101(b) compels EPA action to fulfill its duty ''as a trustee of the environment for succeeding generations.''

NGO Petitioners' third claim is that a wide range of technology is currently available to reduce GHG emissions from nonroad engines and vehicles and that, in addition, the CAA was intended to be a technology-forcing statute so that EPA ''can and should'' establish regulations that ''substantially limit GHG emissions.* * * even where those regulations force the development of new technology.'' Regarding technology availability, petitioners provide a list of technologies that they believe are currently available to reduce GHG emissions from nonroad vehicles and engines, including auxiliary power unit systems to avoid engine use solely to

[177] The two petitions request that EPA regulate slightly different categories of nonroad engines and vehicles under CAA section 213. State Petitioners exclude from their request aircraft, locomotives and ocean-going vessels and do not include rebuilt heavy-duty engines. The *NGO Petitioners* exclude only aircraft and ocean-going vessels but also request that EPA use its CAA section 202 authority to regulate GHG emissions from rebuilt heavy-duty engines.

[178] States Petition for Nonroad, page 7–8.

[179] Petitioners indicate that in 2007, non-transportation mobile vehicles and equipment were responsible for approximately 220 million tons of CO_2 emissions (data derived from EPA's Nonroad Emissions model for 2007). State of California et al, Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Nonroad Vehicles and Engines, page 8, January 29, 2008, and International Center for Technology Assessment et al, Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Nonroad Vehicles and Engines, page 5, January 29, 2008.

[180] State Petition for Nonroad, page 9.

[181] *NGO Petition*, page 8.

heat or cool the cab; tire inflation systems; anti-idling standards; use of hybrid or hydraulic-hybrid technology; use of low carbon fuels; and use of low viscosity lubricants.

Both State and NGO Petitioners request three types of relief: (1) That EPA make a positive endangerment determination for GHG emissions from nonroad vehicles and engines; [182] (2) that EPA adopt regulations to reduce GHG emissions from this sector; and (3) that regulations necessary to carry out the emissions standards also be adopted.[183] We invite comment on all of the petitioners' assertions and requests.

2. Nonroad Engines and Vehicles

In this section, we discuss the GHG emissions and reduction technologies that are or may be available for the various nonroad engines and vehicles that are the subject of the petitioners described above. Since section 213 was added to the CAA in 1990, the Agency has completed a dozen major rulemakings which established programs that reduce traditional air pollutants from nonroad sources by over 95%, benefitting local, regional, and national air quality. EPA's approach has been to set standards based on technology innovation, with flexibility for the regulated industries to meet environmental goals through continued innovation that can be integrated with marketing plans.

With help from industry, environmental groups and state regulators, EPA has designed nonroad regulatory programs that have resulted in significant air quality gains with little sacrifice of products' ability to serve their purpose. In fact, manufacturers have generally added new features and performance improvements that are highly desirable to users. Because GHG reductions from nonroad sources can be derived from fuel use reductions that directly benefit the user's bottom line, we expect that manufacturers' incentive to increase the fuel efficiency of their products will be even stronger in the future. This potential appears higher for nonroad engines compared to highway engines because in the past energy consumption has been less of a focus in the nonroad sector, so there may be more opportunity for improvement, while at the same time higher fuel prices are now beginning to make fuel expenses more important to potential equipment purchasers.

The Agency and regulated industries have in the past grouped nonroad engines in a number of ways. The first is by combustion cycle, with two primary cycles in use: compression-ignition (CI) and spark-ignition (SI). The combustion cycle is closely linked to grouping by fuel type, because CI engines largely burn diesel fuel while SI engines burn gasoline or, for forklifts and other indoor equipment, liquefied petroleum gas (LPG). It has also been useful to group nonroad engines by application category. Regulating nonroad engine application categories separately has helped the Agency create effective control programs, due to the nonroad sector's tremendous diversity in engine types and sizes, equipment packaging constraints, affected industries, and control technology opportunities. Although for the sake of discussion we use these application groupings, we solicit comment on what grouping engines and applications would make the most sense for GHG regulation, especially if flexible emissions credit and averaging concepts are pursued across diverse applications.

a. Nonroad Engine and Vehicle GHG Emissions

Nonroad engines emitted 249 million metric tons of CO_2 in 2006, 12% of the total mobile source CO_2 emissions.[184] CO_2 emissions from the nonroad sector are expected to increase significantly in the future, approximately 46% between 2006 and 2030. Diesel engines emit 71% of the total nonroad CO_2 emissions. The other 29% comes from gasoline, LPG, and some natural gas-fueled engines. CO_2 emissions from individual nonroad application categories in decreasing order of prominence are: Nonroad diesel (such as farm tractors, construction and mining equipment), diesel locomotives, small SI (such as lawn mowers, string trimmers, and portable power generators), large SI (such as forklifts and some construction machines), recreational marine SI, and recreational offroad SI (such as all terrain vehicles and snowmobiles).

GHG emissions from nonroad applications are dominated by CO_2 emissions which comprise approximately 97% of the total. Approximately 3% of the GHG emissions (on a CO_2 equivalent basis) from nonroad applications are due to hydrofluorocarbon emissions, mainly from refrigerated rail transport. Methane and N_2O make up less than 0.2% of the nonroad sector GHG emissions on a CO_2 equivalent basis. Much of the following discussion focuses on technology opportunities for CO_2 reduction, but we note that these technologies will generally reduce N_2O and methane emissions as well, and we ask for comment on measures and options for specifically addressing N_2O and methane emissions.

b. Potential for GHG Reductions From Nonroad Engines and Vehicles

The opportunity for GHG reductions from the nonroad sector closely parallels the highway sector, especially for the heavy-duty highway and nonroad engines that share many design characteristics. In addition, there is potential for significant further GHG reductions from changes to vehicle and equipment characteristics. A range of GHG reduction opportunities is summarized in the following discussion. Comment is requested on these opportunities and on additional suggestions for reducing GHGs from nonroad sources.

It should be noted that any means of reducing the energy requirements necessary to power a nonroad application can yield the desired proportional reductions of GHGs (and other pollutants as well). Although in past programs, the Agency has typically focused on a new engine's emissions per unit of work, such as gram/brake horsepower-hour (g/bhp-hr), it may prove more effective to achieve GHG reductions by redesigning the equipment or vehicle that the engine powers so that the nonroad application accomplishes its task while expending less energy. Improvements such as these do not show up in measured g/bhp-hr emissions levels, but would be reflected in some other metric such as grams emitted by a locomotive in moving a ton of freight one mile.

EPA solicits comment on possible nonroad GHG emissions reduction strategies for the various ''pathways'' by which GHGs can be impacted. Although it is obvious that internal combustion engines emit GHGs via the engine exhaust, it is helpful to take the analysis to another level by putting it in the context of energy use and examining the pathways by which energy is expended in a nonroad application, such as through vehicle braking. Because of the diversity of nonroad applications, we are taking a different approach here than in other sections of this notice: first, we summarize some of the engine, equipment, and operational pathways

[182] In addition, NGO Petitioners also request that EPA make a determination under CAA section 202 (a)(3)(D) that GHG emissions from rebuilt heavy-duty engines also are significant contributors to air pollution which may reasonably be anticipated to endanger public health and welfare. NGO Petition, page 11.

[183] State Petitioners indicate that adopting regulations specifying fuel type, for example, may be necessary to carry out the emission limitations.

[184] Emissions data in this section are from *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006.* EPA 430–R–08–005. April 2008, and EPA NONROAD2005a model.

and opportunities for GHG reductions that are common to all or at least a large number of nonroad applications; next, we examine more closely just one of the hundreds of nonroad applications, locomotives, to illustrate the many additional application-specific pathways for GHG reductions that are available. Our assessment is that, despite the great diversity in nonroad applications, technology-based solutions exist for every application to achieve cost-effective and substantial GHG emissions reductions.

i. Common GHG Reduction Pathways

To ensure that this advance notice initiates the widest possible discussion of potential GHG control solutions, the following discussion includes all three types of possible control measures: engine, equipment, and operational.

(1) Engine Pathways

To date, improving fuel usage in many nonroad applications has not been of great concern to equipment users and therefore to designers. There is potential for technologies now fairly commonplace in the highway sector, such as advanced lubricants and greater use of electronic controls, to become part of an overall strategy for GHG emissions reduction in the nonroad sector. We welcome comment on the opportunities and limitations of doing so.

One engine technology in particular warrants further discussion. Two-stroke gasoline engines have been popular especially in handheld lawn care applications and recreational vehicles because they are fairly light and inexpensive. However, they also produce more GHGs than four-stroke engines. Much progress has been made in recent years in the development of four-stroke engines that function well in these applications. We ask for comment on the extent to which a shift to four-stroke engines would be feasible and beneficial.

Although today's nonroad gasoline and diesel engines produce significantly less GHGs than earlier models, further improvements are possible. Engine designers are continuing to work on new designs incorporating technologies that produce less GHGs, such as homogeneous charge CI, waste heat recovery through turbo compounding, and direct fuel injection in SI engines. Most of this work has already been done for the automotive sector where economies of scale can justify the large investments. Much of this innovation can eventually be adapted to nonroad applications, as has occurred in the past with such technologies as electronic fuel injection and common rail fueling. We therefore request comment on the feasibility and potential for these advanced highway sector technologies, discussed in section VI.B, to be introduced or accelerated in the nonroad sector.

(2) Equipment and Operational Pathways

Technology solutions in both the equipment design and operations can reach beyond the engine improvements to further reduce GHG emissions. We broadly discuss the following technologies below: Regenerative energy recovery and hybrid power trains, CVT transmissions, air conditioning improvements, component design improvements, new lighting technologies, reduced idling, and consumer awareness.

Locomotives, as an example, have significant potential to recover energy otherwise dissipated as heat during braking. An 8,000-ton coal train descending through 5,000 feet of elevation converts 30 MW-hrs of potential energy to frictional and dynamic braking energy. Storing that energy on board quickly enough to keep up with the energy generation rate presents a challenge, but may provide a major viable GHG emissions reduction strategy even if only partially effective. Another regenerative opportunity relates to the specific, repetitive, predictable work tasks that many nonroad machines perform. For example, a forklift in a warehouse may lift a heavy load to a shelf and in doing so expend work. Just as often, the forklift will lower such a load from the shelf, and recover that load's potential energy, if a means is provided to store that energy on board.

There are, however, many nonroad applications that may not have much potential for regenerative energy recovery (a road grader, for example), but in those applications a hybrid diesel-electric or diesel-hydraulic system without a regenerative component may still provide some GHG benefits. A machine that today is made with a large engine to handle occasional peak work loads could potentially be redesigned with a smaller engine and battery combination sized to handle the occasional peak loads.

Besides pre-existing electrical or hydraulic systems, some nonroad applications have one additional advantage over highway vehicles in assessing hybrid prospects: They often have quite predictable load patterns. A hybrid locomotive, for example, can be assigned to particular routes, train sizes, and consist (multi-locomotive) teams, to ensure it is used as close to full capacity as possible. The space needs of large battery banks could potentially be accommodated on a tender car, and the added weight would be offset somewhat by a smaller diesel fuel load (typically 35,000 lbs today) and dynamic brake grid. At least one locomotive manufacturer, General Electric, is already developing a hybrid design, and battery energy storage has been demonstrated for several years in rail yard switcher applications.

We request comment on all aspects of the hybrid and regeneration opportunity in the nonroad sector, including the extent to which the electric and hydraulic systems already designed into many nonroad machines and vehicles could provide some cost savings in implementing this technology, and the extent to which plug-in technologies could be used in applications that have very predictable downtime such as overnight at construction sites, or that can use plug-in electric power while working or while sitting idle between tasks.

A Continuously Variable Transmission (CVT) has an advantage over other conventional transmission designs by allowing the engine to operate at its optimum speed over a range of vehicle speeds and typically over a wider range of available ratios, which can provide GHG emission reductions. It has been estimated that CVTs can provide a 3 to 8% decrease in fuel use over 4-speed automatic transmissions.[185] They are already in use some in nonroad vehicles such as snowmobiles and all-terrain vehicles, and could possibly be used in other nonroad applications as well. We request comment on the opportunities to apply CVT to various nonroad applications.

Some nonroad applications have air conditioning or refrigeration equipment, including large farm tractors, highway truck transport refrigeration units (TRUs), locomotives, and refrigerated rail cars. Reducing refrigerant leakage in the field or reducing its release during maintenance would work to reduce GHG emissions In addition, a switch to refrigerants with lower GHG emissions than the currently-used fluorinated gases can have a significant impact. We expect that the measures used to reduce nonroad equipment refrigerant GHGs would most likely involve the same strategies that have been or could be pursued in the highway and stationary

[185] ''Effectiveness and Impact of Corporate Average Fuel Economy (CAFE) Standards,'' National Research Council, National Academy of Sciences, 2002.

source sectors, and the reader is referred to section VI.B.1 for additional discussion. We request comment on the degree to which nonroad applications emit fluorinated gases, and on measures that may be taken to reduce these emissions.

An extensive variety of energy-consuming electrical, mechanical, and hydraulic accessories are designed into nonroad machines to help them perform their tasks. Much of the energy output of a nonroad engine passes through these components and systems in making the machine do useful work, and all of them have associated energy losses through bearing friction, component heating, and other pathways. Designing equipment to use components with lower GHG impacts in these systems can yield substantial overall reductions in GHG emissions.

Some nonroad applications expend significant energy in providing light, such as locomotive headlights and other train lighting. Furthermore, diesel-powered portable light towers for highway construction activities at night are increasingly being used to reduce congestion from daytime lane closures. We request comment on the extent to which a switch to less energy-intensive lighting could reduce GHG emissions.

Many nonroad diesel engines are left idling during periods when no work is demanded of them, generally as a convenience to the operator, though modern diesel engines are usually easy to restart. In some applications this may occupy hours every day. Even though the hourly fuel rate is fairly low during idle, in the past several years railroads have saved considerable money by adding automatic engine stop start (AESS) systems to locomotives. These monitor key parameters such as state of battery charge, and restart the engine only as needed, thereby largely eliminating unnecessary idling. They reduce GHG emissions and typically pay for themselves in fuel savings within a couple of years. Our recent locomotive rule mandated these systems for all new locomotives as an emission control measure (40 CFR 1033.115(g)). AESS or similar measures may be feasible for other nonroad applications with significant idling time as well. We request comment on the availability and effectiveness of nonroad idle reduction technologies.

ii. Application-Specific GHG Pathways

As mentioned above, we discuss application-specific approach for further reducting GHG emissions from one nonroad application, locomotives, to illustrate application-specific opportunities for GHG emission reductions beyond those discussed above that apply more generally. We note that some of these application-specific opportunities, though limited in breadth, may be among the most important, because of their large GHG reduction potential.

We have chosen locomotives for this illustration in part because rail transportation has already been the focus of substantial efforts to reduce its energy use, resulting in generally favorable GHG emissions per ton-mile or per passenger-mile. The Association of American Railroads calculates that railroads move a ton of freight 423 miles on one gallon of diesel fuel.[186] Reasons for the advantage provided by rail include the use of medium-speed diesel engines, lower steel-on-steel rolling resistance, and relatively gradual roadway grades. Rail therefore warrants attention in any discussion on mode-shifting as a GHG strategy. Even if GHG emissions reduction were not at issue, shippers and travelers already experience substantial mode-shift pressure today from long-term high fuel prices. Growth in the rail sector highlights the critical importance of locomotive GHG emissions reduction.

We have listed some key locomotive-specific opportunities below. We note that a number of these are aimed at addressing GHG pathways from rail cars. Rail cars create very significant GHG reduction pathways for locomotives, because all of the very large energy losses from railcar components translate directly into locomotive fuel use. This is especially important when one considers that an average train has several dozen cars. We request comment on the feasibility of the ideas on this list and on other possible ways to reduce GHG emissions.

Opportunities for Rail GHG Reduction

Locomotives

- Low-friction wheel bearings
- Aerodynamic improvements
- Idle emissions control beyond AESS (such as auxiliary power units)
- Electronically-controlled pneumatic (ECP) brakes
- High-adhesion trucks (wheel assemblies)
- Global positioning system (GPS)-based speed management (to minimize braking, over-accelerations, and run-out/run-in losses at couplings)

Railcars

- Low-torque rail car wheel bearings
- Tare weight reduction
- Aerodynamic design of rail cars and between-car gaps
- Better insulated refrigeration cars

Rail Infrastructure

- Application of lubricants or friction modifiers to minimize wheel-to-track friction losses
- Higher-speed railroad crossings
- Targeted-route electrification
- Rail yard infrastructure improvements to eliminate congestion and idling

Operational

- Consist manager (automated throttling of each locomotive in a consist team for lowest overall GHG emissions)
- Optimized GPS-assisted dispatching/routing/tracking of rail cars and locomotives
- Optimized matching of locomotives with train load for every route (including optimized placement of each locomotive along the train)
- Expanded resource sharing among railroads
- Reduction of empty-car trips
- Early scrappage of higher-GHG locomotives

c. Regulatory Options for Nonroad Engines and Vehicles

There is a range of options that could be pursued under CAA section 213 to control nonroad sector GHGs. The large diversity in this sector allows for a great number of technology solutions as discussed above, while also presenting some unique challenges in developing a comprehensive, balanced, and effective regulatory program, and highlights the importance of considering multiple potential regulatory strategies. We have met similar challenges in regulating traditional air pollutants from this sector, and we request comment on the regulatory approaches discussed below and whether they would address the challenges of regulating GHGs from nonroad engines.

As discussed in our earlier section on heavy-duty vehicles, the potential regulatory approaches that we discuss here should be considered not as discrete options but as a continuum of possible approaches to address GHG emissions from this sector. Just as we have in our technology discussion, these regulatory approaches begin with the engine and then expand to included potential approaches to realize reductions through vehicle and operational changes. In approaching the discussion in this way, each step along such a path has the potential to greater regulatory complexity but also has the

[186] Comments of the Association of American Railroads on EPA's locomotive and marine engine proposal, July 2, 2007. Available in EPA docket EPA–HQ–OAR–2003–0190.

potential for greater regulatory flexibility, GHG reduction, and program benefits. For large GHG reductions in the long term we expect to give consideration to approaches that accomplish the largest reductions, but we also note that, given the long time horizons for GHG issues, we can consider a number of incremental regulatory steps along a longer path. Also, given the absence of localized effects associated with GHG emissions, EPA is interested in considering the incorporation of banking, averaging, and/or credit trading into the regulatory options discussed below.

The first regulatory approach we consider is a relatively straightforward extension of our existing criteria pollutant program for nonroad engines. In its simplest form, this approach would be an engine GHG standard that preserves the current regulatory structure for nonroad engines. Nonroad engine manufacturers are already familiar with today's certification testing and procedures. Just like the highway engine manufacturers, they have facilities, engine dynamometers, and test equipment to appropriately measure GHG emissions. Further, technologies developed to reduce GHG emissions from heavy-duty engines could be applied to the majority of diesel nonroad engines with additional development to address differences in operating conditions and engine applications in nonroad equipment. Hence, this approach would benefit from both regulatory work done to develop a heavy-duty engine GHG program and technology development for heavy-duty engines to comply with a GHG program. While we do not expect that new test cycles would be needed to effect meaningful GHG emissions control, we request comment on whether new test cycles would allow for improved control, and especially on whether there are worthwhile GHG control technologies that would not be adequately exercised and measured under the current engine test cycles and test procedures.

A second approach that would extend control opportunities beyond engine design improvements involves developing nonroad vehicle and equipment GHG standards. Changes to nonroad vehicles and equipment can offer significant opportunity for GHG emission reductions, and therefore any nonroad GHG program considered by EPA would need to evaluate the potential for reductions not just from engine changes but from vehicle and equipment changes as well. In section VI.B.2 we discussed a potential heavy-duty truck GHG standard (e.g., a gram per mile or gram per ton-mile standard). A similar option could be considered for at least some portion of nonroad vehicles and equipment. For example, a freight locomotive GHG standard could be considered on a similar mass per ton mile basis. This would be a change from our current mass per unit work approach to locomotive regulation, but section 213 of the Clean Air Act does authorize the Agency to set vehicle-based and equipment-based nonroad standards as well.

However, we are concerned that there may be significant drawbacks to widespread adoption of this application-specific standards-setting approach. For the freight locomotive example given above, a gram per ton-mile emissions standard measured over a designated track route might be a suitable way to express a GHG standard, but such a metric would not necessarily be appropriate for other applications. Instead each application could require a different unit of measure tied to the machine's mission or output— such as grams per kilogram of cuttings from a ''standard'' lawn for lawnmowers and grams per kilogram-meter of load lift for forklifts. Such application-specific standards would provide the clearest metric for GHG emission reductions. The standards would directly reflect the intended use of the equipment and would help drive equipment and engine designs that most effectively meet that need while reducing overall GHG emissions. However, the diversity of tasks performed by the hundreds of nonroad applications would lead to a diverse array of standard work units and measurement techniques in such a nonroad GHG program built on equipment-based standards. We request comments on this second regulatory approach, and in particular comments that identify specific nonroad applications that would be best served by such a nonroad vehicle-based regulatory approach.

A variation on the above-described approaches would be to maintain the relative simplicity of an engine-based standard while crediting the GHG emission reduction potential of new equipment designs. Under this option, the new technology would be evaluated by measuring GHG emissions from a piece of equipment that has the new technology while performing a standard set of typical tasks. The results would then be compared with data from the same or an identical piece of equipment, without the new technology, performing the same tasks. This approach could be carried out for a range of equipment models to help improve the statistical case for the resulting reductions. The percentage reduction in GHG emissions with and without the new equipment technology could then be applied to the GHG emissions measured in certification testing of engines used in the equipment in helping to demonstrate compliance with an engine-based GHG standard. Thus if a new technology were shown to reduce the GHG emissions of a typical piece of equipment by 20%, that 20% reduction could be applied at certification to the GHG emission results from a more traditional engine-based test procedure and engine-based standard.

In fact, a very similar approach has been adopted in EPA's recently established locomotive program (see 73 FR 25155, May 6, 2008). In this provision, credit is given to energy-saving measures based on the fact that they provide proportional reductions in the criteria pollutants. This credit takes the form of an adjustment to criteria pollutant emissions measured under the prescribed test procedure for assessing compliance with engine-based standards.

A more flexible extension of this approach would be to de-link the equipment-based GHG reduction from the compliance demonstration for the particular engine used in the same equipment. Instead the GHG difference would provide fungible credits for each piece of equipment sold with the new technology, credits that then could be used in a credit averaging and trading program. Under this concept it would be important to collect and properly weight data over an adequate range of equipment and engine models, tasks performed, and operating conditions, to ensure the credits are deserved. We request comments on the option of applying the results of equipment testing to an engine-based GHG standard and the more general concept of generating GHG emission credits from such an approach. We also request comment on whether such credit-based approaches to accounting for the many promising equipment measures are likely to obtain similar GHG reductions as the setting of equipment based standards, and on whether some combined approach involving both standards and credits may be appropriate.

There are also a number of ways to reduce GHG emissions in the nonroad sector that do not involve engine or equipment redesign. Rather, reductions can be achieved by altering the way in which the equipment is used. For example, intermodal shipping moving freight from trucks and onto lower GHG rail or marine services, provides a means of reducing these emissions for freight shipments that can accommodate the logistical constraints of intermodal shipping. Many of the operational measures with GHG-reducing potential do involve a significant technology component, perhaps even hardware changes, but they can also involve actions on the part of the equipment operator or owner that go beyond simply maintaining and not tampering with the emission controls. For example, a railroad may make the capital and operational investment in sophisticated computer technology to dispatch and schedule locomotive resources, using onboard GPS-based tracking hardware. The GHG reduction benefit, though enabled in part by the onboard hardware, is not realized without the people and equipment assigned to the dispatch center.

Credit for such operational measures could conceivably be part of a nonroad GHG control program and could be calculated and assigned using the same ''with and without'' approach to credit generation described above for equipment-based changes. However, some important implementation problems arise from the greater human element involved. This human element becomes increasingly significant as the scope of creditable measures moves further away from automatic technology-based solutions. Assigning credits to such measures must involve good correlation between the credits generated and the GHG reductions achieved in real world applications. It therefore may make sense to award these credits only after an operational measure has been implemented and verified as effective. This might necessitate that such credits have value for equipment or sources other than the equipment associated with the earning of the credit, such as in a broader credit market. This is because nonroad equipment and engines must demonstrate compliance with EPA standards before they are put into service. They therefore cannot benefit from credits created in the future unless through some sort of credit borrowing mechanism.

Once verified, however, we would expect credits reflecting these operational reductions could be banked, averaged and traded, just as much as credits derived from equipment- or engine-based measures. Verifiable GHG reductions, regardless of how generated, have equal value in addressing climate change. We also note, however, that an effective credit program, especially one with cross-sector utility, should account for the degree to which a credit-generating measure would have happened anyway, or would have happened eventually, had no EPA program existed; this is likely to be challenging. We request comment on the appropriateness of a much broader GHG credit-based program as described here.

In this section, we have laid out a range of regulatory approaches for nonroad equipment that takes us from a relatively simple extension of our existing engine-based regulatory program through equipment based standards and finally to a fairly wide open credit scheme that would in concept at least have the potential to pull in all aspects of nonroad equipment design and operation. In describing these approaches, we have noted the increasing complexity and the greater need for new mechanisms to ensure the emission reductions anticipated are real and verifiable. We seek comment on the relative merits of each of these approaches but also on the potential for each approach along the continuum to build upon the others.

3. Marine Vessels

Marine diesel engines range from very small engines used to propel sailboats, or used for auxiliary power, to large propulsion engines on ocean-going vessels. Our current marine diesel engine emission control programs distinguish between five kinds of marine diesel engines, defined in terms of displacement per cylinder. These five types include small (≤37 kW), recreational, and commercial marine engines. Commercial marine engines are divided into three categories based on per cylinder displacement: Category 1 engines are less than 5 l/cyl, Category 2 engines are from 5 l/cyl up to 30 l/cyl, and Category 3 engines are at or above 30 l/cyl. Category 3 engines are 2- or 4-stroke propulsion engines that typically use residual fuel; this fuel has high energy content but also has very high fuel sulfur levels that result in high PM emissions. Most of the other engine types are 4-stroke and can be used to provide propulsion or auxiliary power. These operate on distillate fuel although some may operate on a blend of distillate and residual fuel or even on residual fuel (for example, fuels commonly known as DMB, DMC, RMA, and RMB).

There are also a wide variety of vessels that use marine diesel engines and they can be distinguished based on where they are used. Vessels used on inland waterways and coastal routes include fishing vessels that may be used either seasonally or throughout the year, river and harbor tug boats, towboats, short- and long-distance ferries, and offshore supply and crew boats. These vessels often have Category 2 or smaller engines and operate in distillate fuels. Ocean-going vessels (OGVs) include container ships, bulk carriers, tankers, and passenger vessels and have Category 3 propulsion engines as well as some smaller auxiliary engines. As EPA deliberates on how to potentially address GHG emissions from marine vessels, we will consider the significance of the different engine, vessel, and fuel types. We invite comment on the marine specific issues that EPA should consider; in particular, we invite commenters to compare and contrast potential marine vessel solutions to our earlier discussions of highway and nonroad mobile sources and our existing marine engine criteria pollutant control programs.

a. Marine Vessel GHG Emissions

Marine engines and vessels emitted 84.2 million metric tons of CO_2 in 2006, or 3.9 percent of the total mobile source CO_2 emissions. CO_2 emissions from marine vessels are expected to increase significantly in the future, more than doubling between 2006 and 2030. The emissions inventory from marine vessels comes from operation in ports, inland waterways, and offshore. The CO_2 inventory estimates presented here refer to emissions from marine engine operation with fuel purchased in the United States.[187] OGVs departing U.S. ports with international destinations take on fuel that emits 66 percent of the marine vessel CO_2 emissions; the other 34 percent comes from smaller commercial and recreational vessels.

GHG emissions from marine vessels are dominated by CO_2 emissions which comprise approximately 94 percent of the total. Approximately 5.5 percent of the GHG emissions from marine vessels are due to HFC emissions, mainly from reefer vessels (vessels which carry refrigerated containers). Methane and nitrous oxide make up less than 1 percent of the marine vessel sector GHG emissions on a CO_2 equivalent basis. Comment is requested on the contribution of marine vessels to GHG emissions and on projections for growth in this sector.

b. Potential for GHG Reductions From Marine Vessels

There are significant opportunities to reduce GHG emissions from marine vessels through both traditional and innovative strategies. These strategies include technological improvements to engine and vessel design as well as changes in vessel operation. This

[187] U.S. EPA, ''Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006,'' April 15, 2008.

section provides an overview of these strategies, and a more detailed description is available in the public docket.[188] EPA requests comment on the advantages and drawbacks of each of the strategies described below, as well as on additional approaches for reducing greenhouse gases from marine vessels.

i. Reducing GHG Emissions Through Marine Engine Changes

GHG emissions may be reduced by increasing the efficiency of the marine engine. As discussed earlier for heavy-duty trucks, there are a number of improvements for CI engines that may be used to lower GHGs. These improvements include higher compression ratios, higher injection pressure, shorter injection periods, improved turbocharging, and electronic fuel and air management. Much of the energy produced in a CI engine is lost to the exhaust. Some of this energy can be reclaimed through the use of heat recovery systems. We request comment on the feasibility of reducing GHG emissions through better engine designs and on additional technology which could be used to achieve GHG reductions.

As discussed above, marine engines are already subject to exhaust emission standards. Many of the noxious emissions emitted by internal combustion engines may also be GHGs. These pollutants include NO_X, methane, and black carbon soot. Additionally, some strategies used to mitigate NO_X and PM emissions can also indirectly impact GHGs through their impact on fuel use—for example, use of aftertreatment rather than injection timing retard to reduce NO_X emissions. We request comment on the GHG reductions associated with $HC+NO_X$ and PM emissions standards for these engines.

The majority of OGVs operate primarily on residual fuel, while smaller coastal vessels operate primarily on distillate fuel. Shifting more shipping operation away from residual fuel would reduce GHG emissions from the ship due to the lower carbon/hydrogen ratio in distillate fuel. Marine engines have been developed that operate on other lower carbon fuels such as natural gas and biodiesel. Because biodiesel is a renewable fuel, lifecycle GHG emissions are much lower than for operation on petroleum diesel. We request comment on these and other fuels that may be used to power marine vessels and the impact these fuels would have on lifecycle GHG emissions.

A number of innovative alternatives are under development for providing power on marine vessels. These alternative power sources include fuel cells, solar power, wind power, and even wave power. While none of these technologies are currently able to supply the total power demands of larger, ocean-going vessels, they may prove to be capable of reducing GHG emissions through auxiliary power or power-assist applications. Hybrid engine designs are used in some vessels where a bank of engines is used to drive electric motors for power generation. The advantage of this approach is that the same engines may be used both for propulsion and auxiliary needs. Another advantage is that alternative power sources could be used with a hybrid system to provide supplemental power. We request comment on the extent to which alternative power sources and hybrid designs may be applied to marine vessels to reduce greenhouse gases.

ii. Reducing GHG Emissions Through Vessel Changes

GHG emissions may be reduced by minimizing the power needed by the vessels to perform its functions. The largest power demand is generally for overcoming resistance as the vessel moves through the water but is also affected by propeller efficiency and auxiliary power needs.

Water resistance is made up of the effort to displace water and drag due to friction on the hull. The geometry of the vessel may be optimized in many ways to reduce water resistance. Ship designers have used technologies such as bulbous bows and stern flaps to help reduce water resistance from the hull of the vessel. Marine vessels typically use surface coatings to inhibit the growth of barnacles or other sea life that would increase drag on the hull. Innovative strategies for reducing hull friction include coatings with textures similar to marine animals and reducing water/hull contact by enveloping the hull with small air bubbles released from the sides and bottom of the ship.

Both the wetted surface area and amount of water displaced by the hull may be reduced by lowering the weight of the vessel. This may be accomplished through the use of lower weight materials such as aluminum or fiberglass composites or by simply using less ballast in the ship when not carrying cargo. Other options include ballast-free ship designs such as constantly flowing water through a series of pipes below the waterline or a pentamaran hull design in which the ship is constructed with a narrow hull and four sponsons which provide stability and eliminate the need for ballast water. We request comment to the extent that these approaches may be used to reduce GHGs by reducing fuel consumption from marine vessels in the future. We also request comment on other design changes that may reduce the power demand due to resistance on the vessel.

In conventional propeller designs, a number of factors must be considered including load, speed, pitch, diameter, pressure pulses, and cavitation (formation of bubbles which may damage propeller and reduce thrust). Proper maintenance of the propeller can minimize energy losses due to friction. In addition, propeller coatings are available that reduce friction on the propeller and lead to energy savings. Because of the impact of the propeller on the operation of the vessel, a number of innovative technologies have been developed to increase the efficiency of the propeller. These technologies include contra-rotating propellers, azimuth thrusters, ducted propellers, and grim vane wheels. We request comment on the GHG reductions that may be achieved through improvements in vessel propulsion efficiency, either through the approaches listed here or through other approaches.

Power is also needed to provide electricity to the ship and to operate auxiliary equipment. Power demand may be reduced through the use of less energy intensive lighting, improved electrical equipment, improved reefer systems, crew education campaigns, and automated air-conditioning systems. We request comment on the opportunities to provide auxiliary power with reduced GHG emissions.

In addition, GHG emissions may be released from leaks in air conditioning or refrigeration systems. There is a large amount of fluorinated and chlorinated hydrocarbons used in refrigeration and air-conditioning systems on ships. We request comment on the degree to which marine vessels emit fluorinated and chlorinated hydrocarbons to the atmosphere, and on measures that may be taken to mitigate these emissions.

iii. Reducing GHG Emissions Through Vessel Operational Changes

In addition to improving the design of the engine and vessel, GHG emissions may be reduced through operational measures. These operational measures include reduced speeds, improved routing and fleet planning, and shore-side power.

[188] ''Potential Technologies for GHG Reductions from Commercial Marine Vessels'', memorandum from Michael J. Samulski, U.S. EPA, to docket xx, DATE.

In general, the power demand of a vessel increases with at least the square of the speed; therefore, a 10 percent reduction in speed could result in more than a 20 percent reduction in fuel consumption, and therefore in GHG emissions. An increased number of vessels operating at slower speeds may be able to transport the same amount of cargo while producing less GHGs. In some cases, vessels operate at higher speeds than necessary simply due to inefficiencies in route planning or congestion at ports. Ship operators may need to speed up to correct for these inefficiencies. GHG reductions could be achieved through improved route planning, coordination between ports, and weather routing systems. GHG reductions may also be achieved by using larger vessels and through better fleet planning to minimize the time ships operate at less than full capacity. We request comment on the extent to which greenhouse gas emissions may be practically reduced through vessel speed reductions and improved route and fleet planning.

Many ports have shore-side power available for ships as an alternative to using onboard engines at berth. To the extent that the power sources on land are able to produce energy with lower GHG emissions than the auxiliary engines on the vessel, shore-side power may be an effective strategy for GHG reduction. In addition to more traditional power generation units, shore-side power may come from renewable fuels, nuclear power, fuel cells, windmills, hydro-power, or geothermal power. We request comment on GHG reductions that could be achieved through the use of shore-side power.

c. Regulatory Options for Marine Vessels

EPA could address GHG emissions from marine vessels using strategies from a continuum of different regulatory tools, including emission standards, vessel design standards, and strategies that incorporate a broader range of operational controls. These potential regulatory strategies are briefly described below. As is the case with other source categories, EPA is also interested in exploring the potential applicability of flexible mechanisms such as banking and credit trading. With regard to ocean-going vessels, we are also exploring the potential to address GHG emissions through the International Maritime Organization under a program that could be adopted as a new Annex to the International Convention for the Prevention of Pollution from Ships (MARPOL). Those efforts are also described below. EPA requests comment on the advantages and drawbacks of each of these regulatory approaches.

As with trucks and land-based nonroad equipment, the first regulatory approach we could consider entails setting GHG emission limits for new marine diesel engines. For engines with per cylinder displacement up to 30 liters (i.e., Category 1 and Category 2), EPA has already adopted stringent emission limits for several air pollutants that may be GHGs, including NO_X, methane (through hydrocarbon standards) and black carbon soot (through PM standards). This emission control program could be augmented by setting standards for GHG emissions that could be met through the application of the technologies described above (e.g., improved engine designs, hybrid power). We request comment regarding issues that EPA should consider in evaluating this approach and the most appropriate means to address the issues raised. We recognize that an engine-based regulatory structure would limit the potential GHG emission reductions compared to programs that include vessel technologies and crediting operational improvements. In the remainder of this section, we consider other options that would have the potential to provide greater GHG reductions by providing mechanisms to account for vessel and operational changes.

A second regulatory approach to address GHG emissions from marine vessels is to set equipment standards. As described above, these could take the form of standards that require reduced air and/or water resistance, improved propeller design, and auxiliary power optimization. Equipment standards could also address various equipment onboard vessels, such as refrigeration units. While Annex VI currently contains standards for ozone depleting substances, this type of control could be applied more broadly to U.S. vessels that are not subject to the Annex VI certification requirements.

A critical characteristic of marine vessels that must be taken into account when considering equipment standards is that not all marine vessels are designed alike for the same purpose. A particular hull design change that would lower GHGs for a tugboat may not be appropriate for a lobster vessel or an ocean-going vessel. These differences will have an impact on how an equipment standard would be expressed. We request comment on how to express equipment standards in terms of an enforceable limit, and on whether it is possible to set a general standard or if separate standards would be necessary for discrete vessel types/sizes. We also request comment on the critical components of a compliance program for an equipment standard, how it can be enforced, and at what point in the vessel construction process it should be applied.

In addition to the above, the spectrum of regulatory approaches we outline in section VI.C.2.c for nonroad engines and vehicles could potentially be applied to the marine sector as well, with corresponding GHG reductions. These would include: (1) Setting mission-based vessel standards (such as GHG gram per ton-mile shipping standards) for at least some marine applications where this can be reliably measured and administered, (2) allowing vessel changes such as lower resistance hull designs to generate credits against marine engine-based standards, (3) granting similar credits for operational measures such as vessel speed reductions, and (4) further allowing such credits to be used in wider GHG credit exchange programs. We note too that the implementation complexities for these approaches discussed in section VI.C.2.c apply in the marine sector as well, and these complexities increase as regulatory approaches move further along the continuum away from engine-based standards.

Separate from the Annex VI negotiations for more stringent NO_X and PM standards discussed above, the United States is working with the Marine Environment Protection Committee of the IMO to explore appropriate ways to reduce CO_2 emissions from ships for several years. At the most recent meeting of the Committee, in April 2008, the Member States continued their work of assessing short- and long-term GHG control strategies. A variety of options are under consideration, including all of those mentioned above. The advantage of an IMO-based program is that it could provide harmonized international standards. This is important given the global nature of vessel traffic and given that this traffic is expected to increase in the future.

4. Aircraft

In this section we discuss and seek comment on the impact of aircraft operations on GHG emissions and the potential for reductions in GHG emissions from these operations. Aircraft emissions are generated from aircraft used for public, private, and national defense purposes including air carrier commercial aircraft, air taxis, general aviation, and military aircraft.

Commercial aircraft include those used for scheduled service transporting passengers, freight, or both. Air taxis fly scheduled and for-hire service carrying passengers, freight or both, but they usually are smaller aircraft than those operated by commercial air carriers. General aviation includes most other aircraft (fixed and rotary wing) used for recreational flying, business, and personal transportation (including piston-engine aircraft fueled by aviation gasoline). Military aircraft cover a wide range of airframe designs, uses, and operating missions.

As explained previously, section 231 of the CAA directs EPA to set emission standards, test procedures, and related requirements for aircraft, if EPA finds that the relevant emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. In setting standards, EPA is to consult with FAA, particularly regarding whether changes in standards would significantly increase noise and adversely affect safety. CAA section 232 directs FAA to enforce EPA's aircraft engine emission standards, and 49 U.S.C. section 44714 directs FAA to regulate fuels used by aircraft. Historically, EPA has worked with FAA and the International Civil Aviation Organization (ICAO) in setting emission standards and related requirements. Under this approach international standards have first been adopted by ICAO, and subsequently EPA has initiated CAA rulemakings to establish domestic standards that are at least as stringent as ICAO's standards. In exercising EPA's own standard-setting authority under the CAA, we would expect to continue to work with FAA and ICAO on potential GHG emission standards, if we found that aircraft GHG emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.

Over the past 25–30 years, EPA has established aircraft emission standards covering certain criteria pollutants or their precursors and smoke; these standards do not currently regulate emissions of CO_2 and other GHGs.[189] However, provisions addressing test procedures for engine exhaust gas emissions state that the test is designed to measure various types of emissions, including CO_2, and to determine mass emissions through calculations for a simulated aircraft landing and takeoff cycle (LTO). Currently, CO_2 emission data over the LTO cycle is collected and reported.[190] Emission standards apply to engines used by essentially all commercial aircraft involved in scheduled and freight airline activity.[191]

a. GHG Emissions From Aircraft Operations

Aircraft engine emissions are composed of about 70 percent CO_2, a little less than 30 percent water vapor, and less than one percent each of NO_X, CO, sulfur oxides (SO_X), non-methane volatile organic carbons (NMVOC), particulate matter (PM), and other trace components including hazardous air pollutants (HAPs). Little or no nitrous oxide (N_2O) emissions occur from modern gas turbines. Methane (CH_4) may be emitted by gas turbines during idle and by relatively older technology engines, but recent data suggest that little or no CH_4 is emitted by more recently designed and manufactured engines.[192] By mass, CO_2 and water vapor are the major compounds emitted from aircraft operations that relate to climate change.

In 2006, EPA estimated that among U.S. transportation sources, aircraft emissions constituted about 12 percent of CO_2 emissions, and more broadly, about 12 percent of the combined emissions of CO_2, CH_4, and N_2O. Together CH_4 and N_2O aircraft emissions constituted only about 0.1 percent of the combined CO_2, CH_4, and N_2O emissions from U.S. transportation sources, and they make up about one percent of the total aircraft emissions of CO_2, CH_4, and N_2O.[193] Aircraft emissions were responsible for about 4 percent of CO_2 emissions from all U.S. sources, and about 3 percent of CO_2, CH_4, and N_2O emissions collectively. While aircraft CO_2 emissions have declined by about 6 percent between 2000 and 2006, from 2006 to 2030, the U.S. Department of Energy projects that the energy use of aircraft will increase by about 60 percent (excluding military aircraft operations).[194] Commercial aircraft make up about 83 percent of both CO_2 emissions and the combined emissions of CO_2, CH_4, and N_2O for U.S. domestic aircraft operations. In addition, U.S. domestic commercial aircraft activity represents about 24 percent of worldwide commercial aircraft CO_2 emissions. With international aircraft departures, the total U.S. CO_2 emissions from commercial aircraft are about 35 percent of the total global commercial aircraft CO_2 emissions.[195 196] Globally, 93 percent of the fuel burn (a surrogate for CO_2) and 92 percent of NO_X emissions from commercial aircraft occur outside of the basic LTO cycle (i.e., operations nominally above 3,000 feet).[197]

The compounds emitted from aircraft that directly relate to climate change are CO_2, CH_4, N_2O and, in highly specialized applications, SF_6.[198] Aircraft also emit other compounds that are indirectly related to climate change such as NO_X, water vapor, and PM. NO_X is a precursor to cruise-altitude ozone, which is a GHG. An increase in ozone also results in increased tropospheric hydroxyl radicals (OH) which reduces ambient CH_4, thus potentially at least partially offsetting the warming effect from the increase in ozone. Water vapor and PM modify or create cloud cover, which in turn can either amplify or

[189] Our existing standards include hydrocarbon emissions and CH_4 is a hydrocarbon. If CH_4 is present in the engine exhaust, it would be measured as part of the LTO test procedure. There is not a separate CH_4 emission standard for aircraft engines.

[190] Certification information includes fuel flow rates over the different modes (and there are specified times in modes) of the LTO cycle. Utilizing this information, the ICAO Engine Emissions Databank reports kilograms of fuel used during the entire LTO cycle (see *http://www.caa.co.uk/default.aspx?catid=702&pagetype=90*).

[191] Regulated aircraft engines are used on commercial aircraft including small regional jets, single-aisle aircraft, twin-aisle aircraft, and 747s and larger aircraft.

[192] IPCC, Aviation and the Global Atmosphere, 1999, at *http://www.grida.no/climate/ipcc/aviation/index.htm*.

[193] U.S. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006,* April 2008, USEPA #430–R–08–005, available at *http://www.epa.gov/climatechange/emissions/usinventoryreport.html*.

[194] Energy Information Administration, Annual Energy Outlook 2008, Report No.: DOE/EIA–0383 (2008), March 2008, available at *http://www.eia.doe.gov/oiaf/aeo/*. These Department of Energy projections are similar to FAA estimates (FAA, Office of Environment and Energy, Aviation and Emission: A Primer, January 2005, at pages 10 and 23, available at *http://www.faa.gov/regulations_policies/policy_guidance/envir_policy/media/aeprimer.pdf*). The FAA projections were based on FAA long-range activity forecasts that assume a constant rate of emissions from aircraft engines in conjunction with an increase in aviation operations. It does not take into account projected improvements in aircraft, aircraft engines, and operational efficiencies.

[195] FAA, System for Assessing Aviation's Global Emissions, Version 1.5, *Global Aviation Emissions Inventories for 2000 through 2004,* FAA–EE–2005–02, September 2005, available at *http://www.faa.gov/about/office_org/headquarters_offices/aep/models/sage/*.

[196] International flights are those that depart from the U.S. and arrive in a different country.

[197] FAA, System for Assessing Aviation's Global Emissions, Version 1.5, *Global Aviation Emissions Inventories for 2000 through 2004,* FAA–EE–2005–02, September 2005, at page 10, at Table 3, available at *http://www.faa.gov/about/office_org/headquarters_offices/aep/models/sage/*.

[198] SF_6 is used as an insulating medium in the radar systems of some military reconnaissance planes. *2006 IPCC Guidelines for National Greenhouse Gas Inventories*, Volume 3, Industrial Processes and Product Use, Chapter 8, Other Product Manufacture and Use, Section 8.3, Use of SF_6 and HFCs in Other Products; *http://www.ipcc-nggip.iges.or.jp/public/2006gl/index.htm*.

dampen climate change.[199] Contrails are unique to aviation operations, and persistent contrails are of interest because they increase cloudiness.[200] The IPCC Fourth Assessment Report (2007) has characterized the level of scientific understanding as low to very low regarding the radiative forcing of contrails and aviation induced cirrus clouds.[201] EPA requests information on the climate change compounds emitted by aircraft and the scientific understanding of their climate effects, including contrail formation and persistence.

b. Potential for GHG Reductions From Aircraft Operations

There are both technological controls and operational measures potentially available to reduce GHG emissions from aircraft and aircraft operations. These are discussed below.

i. Reducing GHG Emissions Through Aircraft Engine Changes

Fuel efficiency and therefore GHG emission rates are closely linked to jet aircraft engine type (e.g., high bypass ratio) and choice of engine thermodynamic cycles (e.g., pressure and temperature ratios), but modifications in the design of the engine's combustion system can also have a substantial effect on the composition of the exhaust.[202] Turbofan engines, with their high bypass ratios and increased temperatures, introduced in the 1970s and 1980s reduced CO_2, HC, and CO emissions, but in many cases put upward pressure on NO_X emission rates. Also, a moderate increase in the engine bypass ratio (high bypass turbofan) decreases fuel burn (and CO_2) by enhancing propulsive efficiency and reduces noise by decreasing exhaust velocity, but it may lead to increased engine pressure ratio and potentially higher NO_X. [203] There is no single relationship between NO_X and CO_2 that holds for all engine types. As the temperatures and pressures in the combustors are increased to obtain better efficiency, emissions of NO_X increase, unless there is also a change in combustor technology.[204] There are interrelationships among the different emissions and noise to be considered in engine design.

The three major jet engine manufacturers in the world are General Electric (GE), Pratt and Whitney, and Rolls-Royce. All of these manufacturers supply engines to both U.S. and non-U.S. aircraft manufacturers, and their engines are installed on aircraft that operate worldwide. These three manufacturers are now (or will be in the future) producing more fuel efficient (lower GHG) engines with improved NO_X. The General Electric GEnx jet engine is being developed for the new Boeing 787, and GE's goal is to have the GEnx engine meet NO_X levels 50 percent lower than the ICAO standards approved in 2005.[205] The combustor technology GE is employing is called the Twin Annular, Pre-mixing Swirler (TAPS) combustor. In addition, the GEnx is expected to improve specific fuel consumption by 15 percent compared to the previous generation of engine technology (GE's CF6 engine).[206]

Pratt and Whitney has developed the geared turbofan technology that is expected to deliver 12 percent reduction in fuel burn while emitting half of the NO_X emissions compared to today's engines. In addition to an advanced gear system, the new engine design includes the next generation technology for advanced low NO_X (TALON). The rich-quench-lean TALON combustor utilizes advanced fuel/air atomizers and mixers, metallic liners, and advanced cooling management to decrease NO_X emissions during the LTO and high-altitude cruise operations. Flight testing of the engine is expected this year, and introduction into service is expected in 2012.[207] Mitsubishi Heavy Industries has chosen the engine for its regional jet.[208] [209]

Rolls-Royce's Trent 1000 jet engine will power the Boeing 787s on order for Virgin Atlantic airlines. The Trent 1000 powered 787 is expected to improve fuel consumption by up to 15 percent compared to the previous generation of engines (Rolls-Royce's Trent 800 engine).[210] The technology in the Trent 1000 improves the operability of the compressors, and enables the engine to run more efficiently at lower speeds. This contributes to better fuel burn, especially in descent.[211]

ii. Reducing GHG Emissions Through Aircraft Changes

Aircraft (or airframe) efficiency gains are mainly achieved through aerodynamic drag and weight reduction.[212] Most of the fuel used by aircraft is needed to overcome aerodynamic drag, since they fly at very high speeds. Reduction of aerodynamic drag can substantially improve the fuel efficiency of aircraft thus reducing GHG emissions. Aerodynamic drag can be decreased by installing add-on devices, such as film surface grooves, hybrid laminar flow technology, blended winglets, and spiroid tips, and GHG emissions can be reduced by each of these measures from 1.6 to 6 percent.

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[199] IPCC, Climate Change 2007—The Physical Science Basis, Contribution of Working Group I to the Fourth Assessment Report of the IPCC, Chapter 2, Changes in Atmospheric Constituents and in Radiative Forcing.

[200] EPA, *Aircraft Contrails Factsheet*, EPA430–F–00–005, September 2000, developed in conjunction with NASA, the National Oceanic and Atmospheric Administration (NOAA), and FAA, available at *http://www.epa.gov/otaq/aviation.htm.*

[201] IPCC, Climate Change 2007—The Physical Science Basis, Contribution of Working Group I to the Fourth Assessment Report of the IPCC, Chapter 2, Changes in Atmospheric Constituents and in Radiative Forcing, (page 202).

[202] IPCC, Aviation and the Global Atmosphere, 1999, at Aircraft Technology and Its Relation to Emissions, at page 221, at section 7.1, available at *http://www.grida.no/climate/ipcc/aviation/index.htm.*

[203] ICCIA, Technical Design Interrelationships, Presentation by Dan Allyn, ICCAIA Chair, at Aviation and the Environment Conference, March 19, 2008, available at *http://www.airlines.org/government/environment/Aviation+and+the+Environment+Conference+Presentations.htm.*

[204] IPCC, Aviation and the Global Atmosphere, 1999, at Aircraft Technology and Its Relation to Emissions, at page 237, at section 7.5.6, available at *http://www.grida.no/climate/ipcc/aviation/index.htm.*

[205] The NO_X standards adopted at the sixth meeting of ICAO's Committee on Aviation Environmental Protection (CAEP) in February 2004 were approved by ICAO in 2005.

[206] General Electric, Press Release, *Driving GE Ecomagination with the Low-Emission GEnx Jet Engine,* July 20, 2005, available at *http://www.geae.com/aboutgeae/presscenter/genx/genx_20050720.html.*

[207] Engine Yearbook, *Pratt & Whitney changing the game with geared turbofan engine,* 2008, at page 96.

[208] Aviation, Japanese Airliner to Introduce PW's New Engine Technology, by Chris Kjelgaard, October 9, 2007, available at *http://www.aviation.com/technology/071009-pw-geared-turbofan-powering-mrj.html.*

[209] The New York Times, *A Cleaner, Leaner Jet Age Has Arrived,* by Matthew L. Wald, April 9, 2008, available at *http://www.nytimes.com/2008/04/09/technology/techspecial/09jets.html?_r=1&ex=1208491200&en=6307ad7d1372acdf&ei=5070&emc=eta1&oref=slogin.*

[210] Rolls-Royce, Trent and the environment, available at *http://www.rolls-royce.com/community/downloads/trent_env.pdf and the Rolls-Royce environmental report*, Powering a better world: Rolls-Royce and the environment, 2007, available at *http://www.rolls-royce.com/community/environment/default.jsp.*

[211] Green Car Congress, *Rolls-Royce Wins $2.6B Trent 1000 Order from Virgin Atlantic; The Two Launch Joint Environmental Initiative,* March 3, 2008, available at *http://www.greencarcongress.com/2008/03/rolls-royce-win.html.*

[212] U.S. Department of Transportation, *Best Practices Guidebook for Greenhouse Gas Reductions in Freight Transportation—Final Report,* Prepared for U.S. Department of Transportation via Center for Transportation and the Environment, Prepared by H. Christopher Frey and Po-Yao Kuo, Department of Civil, Construction, and Environmental Engineering, North Carolina State University, October 4, 2007, available at *http://www4.ncsu.edu/~frey/Frey_Kuo_071004.pdf.*

Further discussion of these devices is provided below.

—Film surface grooves: This technology is undergoing testing, and it is an adhesive-backed film with micro-grooves placed on the outer surfaces of the wings and the fuselage of the aircraft. Film surface grooves are estimated to reduce total aerodynamic drag and GHG emissions by up to 1.6 percent.

—Hybrid laminar flow technology: Contamination on the airframe surface, such as the accumulation of ice, insects or other debris, degrades laminar flow. A newly developed concept, hybrid laminar flow technology (replace turbulent air flow), integrates approaches to maintain laminar flow. This technology can reduce fuel use by 6 to 10 percent and potentially GHG emissions by 6 percent.

—Blended winglets: A blended winglet is a commercially available wing-tip device that can decrease lift-induced drag. This technology is an extension mounted at the tip of a wing. The potential decreases in both GHG emissions and fuel use are estimated to be 2 percent.

—Spiroid tip: A spiroid tip has been pilot tested and, similar to blended winglets, it is intended to reduce lift-induced drag. This technology is a spiral loop formed by joining vertical and horizontal winglets. Greenhouse gas emissions and fuel use are both potentially estimated to be decreased by 1.7 percent.

Reductions in the weight of an aircraft by utilizing light-weight materials and weight reduction of non-essential components could lead to substantial decreases in fuel use. The weight of an airframe is about 50 percent of an aircraft's gross weight. The use of advanced lighter and stronger materials in the structural components of the airframe, such as aluminum alloy, titanium alloy, and composite materials for non-load-bearing structures, can decrease airframe weight. These materials can reduce structural weight by 4 percent. The potential reduction in greenhouse gas emissions and fuel use are estimated to both be 2 percent.

iii. Reducing GHG Emissions Through Operational Changes

Rising jet fuel prices tend to drive the aviation industry to implement practices to decrease fuel usage and lower fuel usage reduces GHG emissions.[213] Indeed this has occurred in the recent past where several airlines have reduced flights and announced plans to retire older aircraft. However, such practices are voluntary, and there is no assurance that such practices would continue or not be reversed in the future. Technology developments for lighter and more aerodynamic aircraft and more efficient engines which reduce aircraft fuel consumption and thus GHG emissions are expected to improve in the future. However, technology changes take time to find their way into the fleet. Aircraft and aircraft engines operate for about 25 to 30 years.

Air traffic management and operational changes are governed by FAA. The FAA, in collaboration with other agencies, is in the process of developing the next generation air transportation system (NextGen), a key environmental goal of which is to decrease aviation's contribution to GHG emissions by reducing aviation system-induced congestion and delay and accelerating air traffic management improvements and efficiencies. As will be discussed below, measures of this type implemented together with technology changes may be a way to reduce GHG emissions in the near term. A few examples of the advanced systems/procedures and operational measures are provided below.

Reduced Vertical Separation Minimum (RSVM) allows air traffic controllers and pilots to reduce the standard required vertical separation from 2,000 feet to 1,000 feet for aircraft flying at altitudes between 29,000 and 41,000 feet. This increases the number of flight altitudes at which aircraft maximize fuel and time efficiency. RSVM has led to about a 2 percent decrease in fuel burn.[214] Continuous Descent Approach is a procedure that enables continuous descent of the aircraft on a constant slope toward landing, as opposed to a staggered or staged approach, thus allowing for a more efficient speed requiring less fuel and reducing GHG emissions. Aircraft auxiliary power units (APUs) are engine-driven generators that supply electricity and pre-conditioned cabin air for use aboard the aircraft while at the gate. Ground-based electricity sources or electrified gates combined with preconditioned air supplies can reduce APU fuel use and thus CO_2 emissions substantially. Single-engine taxiing, a practice already used by some airlines, could be utilized more broadly to reduce CO_2 emissions.[215] Fuel consumption, and thus GHG emissions, could be reduced by decreasing the aircraft weight by reducing the amount of excess fuel carried. More efficient routes and aircraft speeds would be directly beneficial to reducing full flight GHG emissions. Operational safety must be considered in the application of all of these measures.

In regard to the above three sections, we request information on potentially available technological controls (technologies for airframes, main engines, and auxiliary power units) and operational measures to reduce GHG emissions from aircraft operations. Since FAA currently administers and implements air traffic management and operational procedures, EPA would share information on these items with FAA.

Efforts are underway to potentially develop alternative fuels for aircraft in the future. Industry (manufacturers, operators and airports) and FAA established the Commercial Aviation Alternative Fuels Initiative (CAAFI) in 2006 to explore the potential use of alternative fuels for aircraft for energy security and possible environmental improvements. CAAFI's goals are to have available for certification in 2008 a 50 percent Fischer-Tropsch synthetic kerosene fuel, 2010 for 100 percent synthetic fuel, and as early as 2013 for other biofuels. However, any alternative fuel would need to be compatible with current jet fuel for commercial aircraft to prevent the need for tank and system flushing on re-fueling and to meet comprehensive performance and safety specifications. In February 2008, Boeing, General Electric, and Virgin Atlantic airlines tested a Boeing 747 that was partly powered by a biofuel made from babassu nuts and coconut oil, a first for a commercial aircraft.

EPA requests information on decreasing aircraft emissions related to climate change through the use of alternative fuels, including what is feasible in the near-term and long-term and information regarding safety, distribution and storage of fuels at airports, life-cycle impacts, and cost information. Given the Agency's work to develop a lifecycle methodology for fuels as required by the Energy Independence and Security Act, EPA also is interested in information on the lifecycle impacts of alternative fuels.

[213] According to the Energy Information Administration, jet fuel prices increased by about 140 percent from 2000 to 2007 (see *http://tonto.eia.doe.gov/dnav/pet/hist/rjetnyhA.htm.*).

[214] PARTNER, Assessment of the impact of reduced vertical separation on aircraft-related fuel burn and emissions for the domestic United States, PARTNER–COE–2007–002, November 2007, available at *web.mit.edu/aeroastro/partner/reports/rsvm-caep8.pdf.*

[215] ICAO, *Operational Opportunities to Minimize Fuel Use and Reduce Emissions,* Circular 303 AN/176, February 2004, available at *http://www.icao.int/icao/en/m_publications.html.*

c. Options To Address GHG Emissions From the Aviation Sector

In the preceding nonroad sections, we have described a continuum of regulatory approaches that take us from traditional engine standards through a range of potential approaches for vehicle standards and even potential mechanisms to credit operational changes. For commercial aircraft, although the reasons to consider such continuum are just as valid, the means to accomplish these could be simpler. We see at least two potential basic approaches for regulating aircraft GHG emissions under the CAA, engine emission standards or a fleet average standard. These approaches are discussed further below.

The first approach we can consider is setting emission standards as an extension of our current program. Under this approach we would establish, for example, CO_2 exhaust emission standards and related requirements for all newly and previously certified engines applicable in some future year and later years. These standards could potentially cover all phases of flight. Depending on timing, this first set of standards could effectively be used to either establish baseline values and/or to require reductions.

As described earlier, ICAO and EPA currently require measurement and reporting of CO_2 emissions during engine exhaust gaseous emissions testing for the current certification cycle (although the current absence of this information for other GHGs does not rule out a similar approach for those GHGs).[216] Although test procedures for measuring CO_2 are in place already and LTO cycle CO_2 data exists, test requirements to simulate full-flight emissions are a significant consideration. Further work is needed to determine how CO_2 and other GHG emissions measured over the various modes of LTO cycle might be used to as a means to estimate or simulate cruise or full-flight emissions. A method has been developed by ICAO for determining NO_X for climb/cruise operations (outside the LTO) based on LTO data, and this could be a good starting point.[217] [218] For CO_2, and potentially NO_X and other GHGs as well, the climb/cruise methods could then be codified as test procedures, and we could then establish emission standards for these GHGs. We request comments on the need to develop a new test procedure for aircraft engines and the best approach to developing such a procedure, including the viability and need for altitude simulation tests for emissions certification.

Furthermore, to drive the development of engine technology, we could pursue near- and long-term GHG exhaust emission standards. Near-term standards, which could for example apply 5 years from their promulgation, would encourage engine manufacturers to use the best currently available technology. Long-term standards could require more significant reductions in emissions beyond the near-term values. In both cases, new standards could potentially apply to both newly and previously certified engines, but possibly at different levels and implementation dates based on lead time considerations. Under this approach, we would expect that no engines would be able to be produced indefinitely if they did not meet the new standards, except possibly based on the inclusion of an emissions averaging program for GHG as discussed below.

For emission standards applied to other mobile sources, EPA has often incorporated emission averaging, banking and trading (ABT) programs to provide manufacturers more flexibility in phasing-in and phasing-out engine models as they seek to comply with emission standards. In these types of programs, the average emissions within a manufacturer's current year product line are required to meet the applicable standard, which allows a manufacturer to produce some engines with emission levels above the standard provided they are offset with some below the standard. The calculation for average compliance is usually sales, activity, and power weighted. In addition, emissions credits and debits may be generated, banked and traded with other engine manufacturers. We request comment on the approaches to engine standards for reducing GHG emissions and an engine ABT program for new GHG emission standards, including whether certain GHGs, such as CO2, are more amenable than are other GHGs to being addressed by such a program.

As part of this option, we could pursue new standards and test procedures for PM that would encompass LTO and climb/cruise operations (ICAO and EPA currently do not have test procedures or emission standards for PM from aircraft), if we find that aircraft PM emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.[219] Work has been underway for several years under the auspices of the Society of Automotive Engineers E–31 Committee, and EPA/FAA are working actively with this committee to bring forth a draft recommended test procedure. In addition, requirements could potentially be proposed and adopted using the same approach as discussed above for GHGs for near- and long-term standards and newly and already certified engines.

In the preceding nonroad sections, we have discussed several approaches or variations on approaches to include vehicle and operational controls within a GHG emission control program for nonroad equipment. In doing so, we have not discussed direct regulation of equipment or fleet operators. Instead, we have focused on approaches that would credit fleet operators for improvements in operational controls within a vehicle or engine GHG standards program. Those approaches described in section VI.C.2 could apply to aircraft GHG emissions as well, and we request comments on the potential to apply those approaches to aircraft.

As a second approach, in the case of aircraft, it may be more practical and flexible to directly regulate airline fleet average GHG emissions. Under such an approach we would set a declining fleet average GHG emission standard for each airline, based on the GHG emission characteristics of its entire fleet. This would require GHG certification emission information for all engines in the fleet from the aircraft engine manufacturers and information on hours flown and average power (e.g., thrust). Airlines would have GHG emission baselines for a given year based on the engine emission characteristics of their fleet, and beginning in a subsequent year, airlines would be required to reduce their emissions at some annual rate, at some rolling average rate, or perhaps to some prescribed lower level in a future year. This could be done as a fleet average GHG emission standard for each airline or through a surrogate measure of GHGs such as airline total fuel consumption, perhaps adjusted for flight activity in some way. This could

[216] EPA's regulations at 40 CFR 87.62 require testing at each of the following operating modes in order to determine mass emission rates: taxi/idle, takeoff, climbout, descent and approach.

[217] ICAO, CAEP/7 Report, Working Paper 68, CAEP/7–WP/68, February 2007, see *http://www.icao.int.*

[218] ICAO has deferred work on using the NO_X climb/cruise method for a certification procedure and standards since future engines (potential new technologies) may behave in a different way. There may need to be future work to consider the aircraft mission, taking into account all phases of flight and the performance of the whole aircraft.

[219] As mentioned earlier, PM modifies or creates cloud cover, which in turn can either amplify or dampen climate change. Aircraft are also a source of PM emissions that contribute to local air quality near the ground, and the public health and welfare effects from these emissions are an important consideration.

cover all domestic operations and international departures of domestic airlines. The fleet average program could potentially be implemented in the near term since it is not as reliant on lead times for technology change.

Although we might develop such a declining fleet average emissions program based on engine emissions, an operational declining fleet average program could potentially be designed to consider the whole range of engine, aircraft and operational GHG control opportunities discussed above. Under this approach compliance with a declining fleet average standard would be based not only on parameters such as engine emission rates and activity, but could also consider efficiencies gained by use of improved operational controls. It is important to note that as part of this approach, a recordkeeping and reporting system would need to be established for airlines to measure and track their annual GHG emissions. Perhaps this could be accomplished through a surrogate measure of GHGs such as airline total fuel consumption. Today each airline reports its annual fuel consumption to the Department of Transportation. We request comment on the operational fleet average GHG emission standard concept, how it could be designed and implemented, what are important program design considerations, and what are potential metrics for establishing standards and determining compliance. While we have discussed two basic concepts above, we invite comment and information on any other approaches for regulating aircraft GHG emissions.

d. Other Considerations

We are aware that the European Commission (EC) has proposed a program to cap aviation-related CO_2 emissions (cap is 100% of sector's emissions during 2004–2006). They would by 2012 include CO_2 emissions from all flights arriving at and departing from European airports, including U.S.-certified aircraft, in the European Union Emissions Trading Scheme (ETS).[220, 221] If the proposal is adopted, airlines from all countries (EU and non-EU) will be required to submit allowances to cover emissions from all such aircraft flights over the compliance period (e.g., 5 years). The EU has expressed some interest in developing a program to waive this requirement for foreign-flagged carriers (non-EU carriers) whose nations develop ''equivalent'' measures. The petitioners discussed this program, and we invite comments on it.

The 36th Session of ICAO's Assembly met in September 2007 to focus on aviation emissions related to climate change, including the use of emissions trading.[222] In response to the EC's proposed aviation program, the Assembly agreed to establish a high-level group through ICAO to develop a framework of action that nations could use to address these emissions. A report with recommendations is due to be completed before the next Assembly Session in 2010. In addition, the Assembly urged all countries to not apply an emissions trading system to other nations' air carriers except on the basis of mutual consent between those nations.[223]

To address greenhouse gas emissions, ICAO's focus currently appears to be on the continued development of guidance for market-based measures.[224] These measures include emissions trading (for CO_2), environmental levies, and voluntary measures. Emissions trading is when an overall target or cap is established and a market for carbon is set. This approach allows participants to buy and sell allowances, the price of which is established by the market. Environmental levies include taxes and charges with the objective of generating an economic incentive to decrease emissions. Voluntary measures are unilateral actions by industry or in an agreement between industry and government to decrease emissions beyond the base case. Note, for ICAO's efforts on CO_2 emission charges, it evaluated an aircraft efficiency parameter, and in early 2004 ICAO decided that there was not enough information available at the time to create a parameter that correlated properly with aircraft/engine performance.[225] However, it is important to note, that unlike EPA, ICAO has not been petitioned under applicable law to determine whether GHG emissions from aircraft may reasonably be anticipated to endanger public health or welfare or to take any action if such a finding is made. We invite information on reducing overall emissions that relate to climate change from aircraft through a cap-and-trade system or other market-based system.

Another consideration in the GHG program is the regulation of emissions from engines commonly used in general aviation aircraft. As indicated earlier, our current aircraft engine requirements apply to gas turbine engines that are mainly used by commercial aircraft, except in cases where general aviation aircraft sometimes use commercial engines. Our requirements do not currently apply to many engines used in business jets or to piston-engines used in aircraft that fall under the general aviation category, although our authority under the Clean Air Act extends to any aircraft emissions for which we make the prerequisite finding that those emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.[226] In 2006, general aviation made up about one percent of the CO_2 emissions from U.S. domestic transportation sources, and about 8 percent of CO_2 emissions from U.S. domestic aircraft operations.[227] Regulating GHG emissions from this sector of aviation would require the development of test procedures and emission standards. EPA requests comment on this matter and on any elements we should consider in potentially establishing test procedures and emission standards for these currently unregulated engines.

5. Nonroad Sector Summary

There are a number of potential approaches for reducing GHG emissions from the nonroad sector within the regulatory structure of the CAA. In considering our next steps to address GHG emissions from this sector, we seek comment on all of the issues raised in this notice along with recommendations

[220] *Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community,* 2006/0304 (COD), COM(2006) 818 final, December 20, 2006, available at *http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&1g=en&type_doc=COMfinal&an_doc=2006&nu_doc=818.*

[221] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community—Political agreement, December 21, 2007 available at *http://register.consilium.europa.eu/pdf/en/07/st16/st16855.en07.pdf.*

[222] ICAO, Assembly—36th Session, Report of the Executive Committee on Agenda Item 17, A36–WP/355, September 27, 2007.

[223] ICAO, Assembly—36th Session, Report of the Executive Committee on Agenda Item 17, A36–WP/355, September 27, 2007.

[224] ICAO, ICAO Environmental Report 2007, available at *http://www.icao.int/env/.*

[225] ICAO, CAEP/6 Report, February 2004, available at *http:/www.icao.int.*

[226] As specified in 40 CFR 87.10, our emission standards apply to different classes of aircraft gas turbine engines, which have a particular minimum rated output. The engine class and rated output specifications correspond to certain engine operational or use practices, but we do not, by the terms of the rule, exempt general aviation aircraft or engines as such.

[227] U.S. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006,* April 2008, USEPA #430–R–08–005, available at *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

on the most appropriate means to address the issues.

D. Fuels

1. Recent Actions Which Reduce GHG Impacts of Transportation Fuels

Historically under Title II of the CAA, EPA has treated vehicles, engines and fuels as a system. The interactions between the designs of vehicles and the fuels they use must be considered to assure optimum emission performance at minimum cost. While EPA continues to view its treatment of vehicles, engines and fuels as a system as appropriate, we request comment on whether it would continue to be advantageous to take this approach for the purpose of controlling GHG emissions from the transportation sector. This section describes existing authorities under the CAA for regulating the GHG emissions contribution of fuels. In this discussion, we ask for comment on the combination of authorities that would suit the goal of GHG emission reductions from transportation fuel use.

In response to CAA section 211(o) adopted as part of the Energy Policy Act of 2005 (Energy Act of 2005), EPA issued regulations implementing a Renewable Fuels Standard (RFS) program (72 FR 23900, May 1, 2007). These regulations were designed to ensure that 4.0 billion gallons of renewable fuel were used in motor vehicles beginning in 2006, gradually increasing to 7.5 billion gallons in 2012. While the primary purpose of this provision of the Energy Act of 2005 was to reduce U.S. dependence on petroleum-based fuel and promote domestic sources of energy, EPA analyzed the extent to which reductions in GHG emissions would also result from the new RFS program. Therefore, for the first time in a major rule, EPA presented estimates of the GHG impacts of replacing petroleum-based transportation fuel with fuel made from renewable feedstocks.

In December 2007, EISA revised section 211(o) to set three specific volume standards for biomass-based diesel, cellulosic biofuel, and advanced biofuel as well as a total renewable fuel standard of 36 billion gallons annually by 2022. Certain eligible fuels must also meet specific GHG performance thresholds based upon a lifecycle GHG assessment. In addition to being limited to renewable fuels, EISA puts constraints on what land sources can be used to produce the renewable fuel feedstock, requires assessment of both primary and significant secondary land use impacts as part of the required lifecycle GHG emissions assessment, and has a number of other specific provisions that affect both the design of the rule and the required analyses. EISA requires that EPA adopt rules implementing these provisions by January 2009.

The U.S. federal government is not alone in considering or pursuing fuel changes which can result in reductions of GHG emissions from the transportation sector California is moving toward adopting a low carbon fuel standard that it anticipates will result in significant reductions in GHG emissions through such actions as increasing the use of renewable fuel and requiring refiners to offset any emission increases that might result from changes in crude oil supply. Canada, the countries of the European Union, and a number of other nations are considering or in the process of requiring fuel changes as part of their strategy to reduce GHG emissions from the transportation sector.

2. GHG Reductions Under CAA Section 211(o)

The two principal CAA authorities available to EPA to regulate fuels are sections 211(c) and 211(o). As explained in previously, section 211(o), added by the Energy Act of 2005 and amended by EISA, requires refiners and other obligated parties to assure that the mandated volumes of renewable fuel are used in the transportation sector. Section 211(o) only addresses renewable fuels; other alternative fuels such as natural gas are not included nor are any requirements imposed on the petroleum-based portion of our transportation fuel pool. EPA is authorized to waive or reduce required renewable fuel volumes specified in EISA under certain circumstances, and is also authorized to establish required renewable fuel volumes after the years for which volumes are specified in the Act (2012 for biomass-based diesel and 2022 for total renewable fuel, cellulosic biofuel and advanced biofuel). One of the factors EPA is to consider in setting standards is the impact of production and use of renewable fuels on climate change. In sum, EPA has limited discretion under 211(o) to improve GHG performance of fuels.

Changes in fuel feedstock sources (for example, petroleum versus biomass) and processing technologies can have a significant impact on GHG emissions when assessed on a lifecycle basis. As analyzed in support of the RFS rules, a lifecycle approach considers the GHG emissions associated with producing a fuel and bringing it to market and then attributes those emissions to the use of that fuel. In the case of petroleum, the lifecycle would account for emissions resulting from extraction of crude oil, shipping the oil to a refiner, refining the oil into a fuel, distributing the fuel to retail markets and finally the burning the gasoline or diesel fuel in an engine. This assessment is sometimes referred to as a ''well-to-wheels'' assessment. A comparable assessment for renewable fuel would include the process of growing a feedstock such as corn, harvesting the feedstock, transferring it to a fuel production facility, turning the feedstock into a fuel, getting the renewable fuel to market and then assessing its impact on vehicle emissions. EPA presented estimates of GHG impacts as part of the assessment for the Energy Act of 2005 RFS rulemaking that increasing renewable fuel use from approximately 4 billion gallons to 7.5 billion gallons by 2012. However, as noted below, the methodology used in that RFS rulemaking did not consider a number of relevant issues.

The 7.5 billion gallons of renewable fuel required by the Energy Act of 2005 program represents a relatively small portion of the total transportation fuel pool projected to be used in 2012 (add figure as % of energy). The much larger 36 billion gallons of renewable fuel required by EISA for 2022 would be expected to displace a much larger portion of the petroleum-based fuel used in transportation and would similarly be expected to have a greater impact on GHG emissions. Comments on the RFS proposal suggested improvements to the lifecycle assessment used in that rule. For instance, the RFS analysis did not fully consider the impact of land use changes both domestically and abroad that would likely result from increased demand for corn and soybeans as feedstock for ethanol and biodiesel production in the U.S. EPA largely agreed with these comments but was not able to incorporate a more thorough assessment of land use impacts and other enhancements in its lifecycle emissions modeling in time. We are undertaking such a lifecycle assessment as we develop the proposal to implement EISA fuel mandates. Because this updated lifecycle assessment will incorporate more factors and the latest data, it will undoubtedly change the estimates of GHG reductions included in the Energy Act 2005 RFS package.

EISA recognizes the importance of distinguishing between renewable fuels on the basis of their impact on lifecycle GHG emissions. Nevertheless, EISA stops short of directly comparing and crediting each fuel on the basis of its estimated impact on GHG emissions. For example, while requiring a minimum of 60% GHG emission reduction for cellulosic biomass fuel compared to the petroleum-based fuel displaced, EISA does not distinguish among the multiple pathways for producing cellulosic biofuel even though these pathways might differ significantly in their lifecycle GHG emission performance. It may be that the least costly fuels meeting the cellulosic biofuel GHG performance threshold will be produced which may not be the fuels with the greatest GHG benefit or even the greatest GHG benefit when considering cost (e.g., GHG reduction per dollar cost). The same consideration applies to other fuels and pathways. Without further delineating fuels on the basis of their lifecycle GHG impact, no incentive is provided for production of particular fuels which would minimize lifecycle GHG emissions within the EISA fuel categories.

We request comment on the importance of distinguishing fuels beyond the categories established in EISA and how an alternative program might further encourage the development and use of low GHG fuels. We also request comment on the ability (including considerations of uncertainty and the measurement of both direct and indirect emissions associated with the production of fuels) of lifecycle analysis to estimate the GHG emissions of a particular fuel produced and used for transportation and how EPA should delineate fuels (e.g., on the basis of feedstock, production technology, etc.). EPA notes that a certain level of aggregation in the delineation of fuels may be necessary, but that the greater the aggregation in the categories of fuels, the fewer incentives exist for changes in behavior that would result in reductions of GHG emissions. EPA asks for comment on this idea as well as how and whether methods for estimating lifecycle values for use in a regulatory program can take into account the dynamic nature of the market. EPA also requests comment on the relative efficacy of a lifecycle-based regulatory approach versus a price-based (e.g., carbon tax or cap and trade) approach to incentivize the multitude of actors whose decisions collectively determine the GHG emissions associated with the production, distribution and use of transportation fuels. Finally, we request comment on the ability to determine lifecycle GHG performance for fuels and fuel feedstocks that are produced outside the U.S.

EISA addresses impacts of renewable fuels other than GHG impacts. Section 203 of EISA directs that the National Academy of Sciences be asked to consider the impacts on producers of feed grains, livestock, and food and food products, energy producers, individuals and entities interested in issues relating to conservation, the environment and nutrition, users and consumers of renewable fuels, and others potentially impacted. Section 204 directs EPA to lead a study on environmental issues, including air and water quality, resource conservation and the growth and use of cultivated invasive or noxious plants. We request comment on what impacts other than GHG impacts should be considered as part of a potential fuels GHG regulation and how such other impacts should be reflected in any policy decisions associated with the rule. These impacts could include the potential impacts on food prices and supplies.

Programs under section 211(o) are subject to further limitations. Limited to renewable fuels, these programs do not consider other alternative fuels such as coal-to-liquids fuel that could be part of the transportation fuel pool and could impact the lifecycle GHG performance of the fuel pool. Additionally, EISA's GHG performance requirements are focused on the renewable fuels, not the petroleum-based fuel being replaced. Under EISA, the GHG performance of renewable fuels is tied to a 2005 baseline for petroleum fuel. No provision is included for considering how the GHG impacts of the petroleum-based fuel pool might change over time, either for the purpose of determining the comparative performance for threshold compliance of renewable fuels or for assessing the impact of the petroleum fuel itself on transportation fuel GHG emissions. Thus, for example, there is no opportunity under EISA to recognize and credit improvements in refinery operation which might improve the lifecycle GHG performance of the petroleum-based portion of the transportation fuel pool. Comments are requested on the importance of lowering GHG emissions from transportation fuels via the inclusion of alternative, non-renewable fuels in a GHG regulatory program as well as the petroleum portion of the fuel pool, thus providing opportunity to reflect improvements in refinery practices.

Finally while the current RFS and anticipated EISA programs will tend to improve the GHG performance of the transportation fuel pool compared to a business as usual case, they would not in any way cap the GHG emissions due to the use of fuels. In fact, under both programs, the total amount of fuel consumed and thus the total amount of GHG emissions from those fuels can both increase. We note that other lifecycle fuel standard programs being developed such as those in California, Canada, and Europe, while also taking into account the GHG emissions reduction potential from petroleum fuels, do not cap the emissions from the total fuel pool; the GHG per gallon of transportation fuel consumed may decrease but the total gallons consumed are not constrained such that the total GHG emissions from fuel may continue to grow. We request comment on setting a GHG control program covering all transportation fuels used in the United States which would also cap the total emissions from these transportation fuels.

Elsewhere in this notice, comments are solicited on the potential for regulating GHG emissions from stationary sources which could include petroleum refineries and renewable and alternative fuel production facilities. EPA recognizes the potential for overlapping incentives to control emissions at fuel production facilities. We request comment on the implications of using a lifecycle approach in the regulation of GHG emissions from fuels which would include refinery and other fuel production facilities while potentially also directly regulating such stationary source emission under an additional control program. Recognizing that the use of biomass could also be a control option for stationary sources seeking to reduce their lifecycle GHG impacts, EPA requests comment on the implications of using biomass for transportation fuel in potential competition as an energy source in stationary source applications.

3. Option for Considering GHG Fuel Regulation Under CAA Section 211(c)

Section 211(c)(1) of the CAA has historically been the primary authority used by EPA to regulate fuels. It provides EPA with authority to ''control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine of nonroad vehicle [(A)] if in the judgment of the Administrator any emission product of such fuel or fuel additive causes or contributes to air pollution or water pollution (including any degradation in the quality of groundwater) which may reasonably be anticipated to endanger public health or welfare.'' Section 211(c)(2) specifies that EPA must consider all available relevant medical and scientific information, including consideration of other technologically or economically feasible means of achieving vehicle emission standards under CAA section 202 before controlling a fuel under section 211(c)(1)(A). A prerequisite to action under 211(c)(1) is an EPA finding that a fuel or fuel additive, or emission product of a fuel or fuel additive, causes or contributes to air or water pollution that may reasonably be anticipated to endanger public health or welfare. Issues related to an endangerment finding are discussed in section V of this advance notice.

EPA asks for comment on whether section 211(c) could be read as providing EPA a broader scope of authority to establish a new GHG fuel program than section 211(o). Specifically, EPA asks for comment on whether section 211(c)(1)(A) could allow EPA to start the program as soon as appropriate in light of our analysis and similarly cover the time period most appropriate; whether it could allow a program that would encourage the use of both renewable and alternative fuels with beneficial GHG emissions impacts and discourage those fuels with relatively detrimental GHG impacts; and whether it could allow EPA to establish requirements for all fuels (gasoline, diesel, renewables, alternative and synthetic fuel, etc.) used in both highway and nonroad vehicles and engines. EPA requests comment on whether the flexibilities under section 211(c) allow it to consider a broad set of options for controlling GHG emissions through fuels, including those that solely regulate the final point of emissions such as tailpipe emissions rather than also controlling the emissions at the fuel production facility through a lifecycle approach.

Typically EPA has acted through CAA section 211(c) to prohibit the use of certain additives (e.g., lead) in fuel, to control the level of a component of fuel to reduce harmful vehicle emissions (e.g., sulfur, benzene), or to place a limit on tailpipe emissions of a pollutant (e.g., the reformulated gasoline standards for volatile organic compounds and toxics emissions performance). While multiple approaches may be available to regulate GHG emissions under section 211(c), one option could require refiners and importers of gasoline and diesel meet a GHG performance standard based on reducing their lifecycle GHG emissions of the fuel they import or produce. They would comply with this performance standard by ensuring the use of alternative and/or renewable fuels that have lower lifecycle GHG emissions than the gasoline and diesel they displace and through selection of lower petroleum sources that also reduce the lifecycle GHG performance of petroleum-based fuel. EPA asks comment on whether section 211(c) could authorize such an approach because it would be a control on the sale or manufacture of a fuel that addresses the emissions of GHGs from the transportation fuels that would be the subject the endangerment finding discussed in section V. Comments are requested on this interpretation of 211(c) authority.

As pointed out above, neither the Energy Act of 2005 RFS program nor the forthcoming program under EISA directly addresses the varying GHG emission reduction potential of each fuel type and production pathway. EPA asks comment on whether it could have the authority under CAA section 211(c) to design and implement a program that includes not only renewable fuels but other alternative fuels, considers the GHG emissions from the petroleum portion of the fuel pool and reflects differences in fuel production not captured by the GHG thresholds established under EISA, including differences in technology at the fuel production facility. We request comment on the factors EPA should consider in developing a GHG fuel control program under section 211(c) and how including such factors could serve to encourage the use of low GHG-emitting practices and technology.

We note that the RFS and the forthcoming EISA programs require refiners and other obligated parties to meet specified volume standards and that these programs are anticipated to continue. We request comment on the impacts and opportunities of implementing both a GHG program under 211(c) and volume mandates under 211(o).

EPA seeks comment on the potential for reducing GHG emissions from transportation fuel over and above those reductions that could be achieved by RFS and the anticipated EISA requirements. Although EPA has not completed its analysis of the GHG emission reductions expected under the combined RFS and EISA programs, EPA seeks comment on how it might structure a program that could reduce GHG emissions from transportation fuel over and above those reductions that could be achieved by the RFS and anticipated EISA requirements.

VII. Stationary Source Authorities and Potential Options for Regulating Greenhouse Gases Under the Clean Air Act

In this section, we explore three major pathways that the CAA provides for regulating stationary sources, as well as other stationary source authorities of the Act, and their potential applicability to GHGs. The three pathways include NAAQS and implementation plans (sections 107–110 and related provisions); performance standards for new and existing stationary sources (section 111); and hazardous air pollutant standards for stationary sources (section 112).[228] Special provisions for regulating solid waste incinerators are contained in section 129.

We also review the implications of regulating GHGs under Act's programs for preconstruction permitting of new emissions sources, with emphasis on the PSD program under Part C of the Act. These programs require permits and emission controls for major new sources and modifications of existing major sources. The permitting discussion closes by examining the implications of requiring operating permits under Title V for major sources of GHGs. Finally, we describe four different types of market-oriented regulatory designs that (in addition to other forms of regulation) could be considered for programs to reduce GHG emissions from stationary sources to the extent permissible under the CAA: cap-and-trade, rate-based emissions trading, emissions fees, and a hybrid approach.

For each potential pathway of stationary source regulation, this notice discusses the following basic questions:

- What does the section require?
- What sources would be affected if GHGs were regulated under this authority?
- What would be the key milestones and implementation timeline?
- What are key considerations regarding use of this authority for GHGs and how could potential issues be addressed?
- What possible implications would use of this authority for GHGs have for other CAA programs?

In discussing these questions, EPA considers the President's core principles and other policy design principles enumerated in Section III.F.1. EPA seeks comment on the advantages and disadvantages of alternative regulatory authorities in light of those policy design principles. EPA further invites comments on the following aspects of each CAA stationary source authority:

- How much flexibility does the CAA section provide for implementing its requirements? For example, can EPA set compliance dates that reflect the global

[228] As explained in this section, the NAAQS pathway is not solely a stationary source regulatory authority; plans for implementating the NAAQS can involve regulation of stationary and mobile sources.

and long-lived nature of GHGs and that allow time for technological advances and new technology deployment?

• To what extent would the section allow for consideration of the costs and economic impacts of regulating GHGs? For example, would the section provide opportunities for sending a price signal, such as through cap and trade programs (with or without cost containment mechanisms) and emission fees.

• To what extent can each section account for the international aspects of GHG emissions, atmospheric concentrations, and emission impacts, including ways for potentially addressing international pollutant transport and emission leakage?

• How does each section address the assessment of available technologies, and to what extent could the section promote or require the advancement of technology?

• To what extent does the section allow for the ability to prioritize regulation of significant emitting sectors and sources?

• To what extent could each authority be adapted to GHG regulation without compromising the Act's effectiveness in regulating traditional air pollutants?

Finally, for each regulatory authority, EPA requests comment on a range of program-specific issues identified in the discussion below. EPA also requests comment on whether there are specific statutory limitations that would best be addressed by new legislation. Additional information concerning potential CAA regulation of stationary source GHGs may be found in the Stationary Source Technical Support Document (Stationary Source TSD) placed in the docket for this notice.

A. National Ambient Air Quality Standards (NAAQS)

1. What Are the Requirements for Setting and Implementing NAAQS?

a. Section 108: Listing Pollutant(s) and Issuing Air Quality Criteria

Section 108(a)(1) establishes three criteria for listing air pollutants to be regulated through NAAQS. Specifically, section 108(a)(1) states that: EPA ''shall from time to time * * * list * * * each air pollutant—

(A) emissions of which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which [the Administrator] plans to issue air quality criteria under this section.''

In determining whether a pollutant meets these criteria, EPA must consider a number of issues, including many of those discussed in section IV above regarding an endangerment finding. As discussed there, in the context of the ICTA petition remand, EPA is considering defining the ''air pollution'' as the elevated current and future concentration of six GHGs (CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6). Also in that context, EPA is considering alternative definitions of ''air pollutant'' as the group of GHGs or each individual GHG for purposes of the ''cause or contribute'' determination.

In considering the potential listing of GHGs under section 108, EPA solicits input on appropriate definitions of both the ''air pollution'' and the ''air pollutants.'' With regard to section 108, it is important to note that EPA has clear precedents for listing related compounds as groups rather than as individual pollutants. For example, photochemical oxidants, oxides of nitrogen, and particulate matter all comprise multiple compounds, but the listing under section 108 is for the group of compounds, not the individual elements of the group. The Agency is soliciting comment on the relevance of these precedents for GHGs. In addition, as discussed later, there would be increased complexity in setting NAAQS for individual GHGs than for GHGs as a group. We are particularly interested in comments on how to apply the terms ''air pollution'' and/or ''air pollutants'' under sections 108 and 109 in the context of GHGs, and the implications of taking consistent or different approaches under other Titles or sections of the Act.

A positive endangerment finding for GHGs under section 202(a) or other sections of the CAA could have significant and direct impacts on EPA's consideration of the first two criteria for listing the pollutant(s) under section 108, as explained in section IV.B.2 of this notice. The third criterion for listing under section 108, however, may be unrelated to the issues involved in any motor vehicle or other endangerment finding. Moreover, this third criterion could provide EPA discretion to decide whether to list those pollutants under section 108 for purposes of regulating them via the NAAQS.[229] EPA requests comment on the effect of a positive finding of endangerment for GHGs under section 202(a) of the Act on potential listing of the pollutant(s) under section 108.

Section 108 also requires that once a pollutant is listed, EPA issue ''air quality criteria'' encompassing ''all identifiable effects on public health or welfare,'' including interactions between the pollutant and other types of pollutants in the atmosphere. We are interested in commenters' views on whether and how developing air quality criteria for GHGs would differ from developing such criteria for other pollutants such as ozone and particular matter, given the long-lived nature of GHGs and the breadth of impacts and other special issues involved with global climate change. EPA also invites comment on the extent to which it would be appropriate to use the most recent IPCC reports, including the chapters focusing on North America, and the U.S. government Climate Change Science Program synthesis reports as scientific assessments that could serve as an important source or as the primary basis for the Agency's issuance of ''air quality criteria.''

Finally, section 108 requires EPA to issue information on air pollution control techniques at the same time it issues air quality criteria. This would include information on the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impacts of these techniques. Generally, the Agency defers this obligation until the time a standard is actually issued. As required under Executive Order 12866, EPA must issue a Regulatory Impact Analysis (RIA) for major rulemaking actions, and it is in this context that EPA has previously described the scope and effectiveness of available pollution control techniques. EPA requests comment on whether this approach is appropriate in the case of GHGs.

b. Section 109: Standard-Setting

Section 109 requires that the Administrator establish NAAQS for any air pollutant for which air quality criteria are issued under section 108. Both the air quality criteria and the standards are to be reviewed and, as appropriate, revised by the Administrator, every five years. These decisions are to be informed by an

[229] With respect to the third criterion, while there is a decision of U.S. Court of Appeals for the Second Circuit to the contrary, *NRDC* v. *Train*, 545 F.2d 320 (2nd Cir. 1978), EPA notes that that decision was rendered prior to the Supreme Court's decision in *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). Thus, a proper and reasonable question to ask is whether this criterion affords EPA discretion to decide whether it is appropriate to apply the NAAQS structure to a global air pollution problem like GHGs.

independent scientific review committee, a role which has been fulfilled by the Clean Air Scientific Advisory Committee (CASAC) of EPA's Science Advisory Board. The committee is charged with reviewing both the air quality criteria for the pollutant(s) and the standards, and recommending any revisions deemed appropriate.

The statute specifically provides that primary NAAQS ''shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health,'' including the health of sensitive groups. The requirement that primary standards provide an adequate margin of safety was intended to address uncertainties associated with inconclusive scientific and technical information available at the time of standard setting. It was also intended to provide a reasonable degree of protection against hazards that research has not yet identified. *Lead Industries Association* v. *EPA*, 647 F.2d 1130, 1154 (DC Cir 1980), *cert. denied*, 449 U.S. 1042 (1980); *American Petroleum Institute* v. *Costle*, 665 F.2d 1176, 1186 (DC Cir 1981), *cert. denied*, 455 U.S. 1034 (1982). The selection of any particular approach to providing an adequate margin of safety is a policy choice left specifically to the Administrator's judgment. *Lead Industries Association* v. *EPA*, 647 F.2d at 1161–62.

With regard to secondary NAAQS, the statute provides that these standards ''specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator * * * is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.'' Welfare effects as defined in CAA section 302(h) include, but are not limited to, ''effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

One of the central issues posed by potential regulation of GHGs through the NAAQS is the nature of the health and environmental effects to be addressed by the standards and, thus, what effects should be addressed when considering a primary (public health) standard and what effects should be addressed when considering a secondary (public welfare) standard. This issue has implications for whether it would be appropriate to establish a primary standard as well as a secondary standard for these pollutants. As discussed above in section V, the direct effects of GHG emissions appear to be principally or exclusively welfare-related. GHGs are unlike other current NAAQS pollutants in that direct exposure to GHGs at current or projected ambient levels appears to have no known adverse effects on human health. Rather, the health impacts associated with ambient GHG concentrations are a result of the changes in climate at the global, regional, and local levels, which trigger myriad ecological and meteorological changes that can adversely affect public health (e.g., increased viability or altered geographical range of pests or diseases; increased frequency or severity of severe weather events including heat waves) (see section V above). The effects on human health are thus indirect impacts resulting from these ecological and meteorological changes, which are effects on welfare. This raises the question of whether it is more appropriate to address these health effects as part of our consideration of the welfare effects of GHGs when setting a secondary NAAQS rather than a primary NAAQS. Control of GHGs would then occur through implementation of the secondary NAAQS rather than the primary NAAQS. EPA invites comment on whether and how these indirect human health impacts should be addressed in the context of setting a primary or a secondary NAAQS.

Past experience suggests EPA may have discretion to decline to set either a primary or a secondary standard for a pollutant if the evidence shows that there are no relevant adverse effects at or near current ambient concentrations, and therefore that no standard would be requisite to protect public health or welfare. In 1985, for example, EPA determined that it was appropriate to revoke the secondary standard for carbon monoxide (CO) after a review of the scientific evidence indicated that there was no evidence of known or anticipated adverse welfare effects associated with CO at or near ambient levels. 50 FR 37484, 37494 (September 13, 1985). This decision was reaffirmed by the Agency in the 1994 CO NAAQS review, and there remains only a primary standard for this pollutant. EPA requests comment on whether it would be necessary and/or appropriate for the Agency to establish both primary and secondary NAAQS for GHGs if those pollutants were listed under section 108.

It is also important to consider how a NAAQS for GHGs would interface with existing NAAQS for other pollutants, particularly oxides of nitrogen (NO_X) and ozone (O3), as well as particulate matter. EPA's approach in other NAAQS reviews has been to consider climate impacts associated with any pollutant as part of the welfare impacts evaluated for that pollutant in setting secondary standards for the pollutant. If separate NAAQS were established for GHGs, EPA would likely address the climate impacts of each specific GHG in the NAAQS for GHGs, and would not need to address the climate impacts of that GHG when addressing other NAAQS, thus avoiding duplication of effort.

In considering the application of section 109 to GHGs and whether it would be appropriate to regulate GHGs through the NAAQS, EPA must evaluate a number of other standard-setting issues, as discussed below.

i. Level

For potential GHG standards, EPA would face special challenges in determining the level of the NAAQS. As noted above, the primary standard must be ''requisite to protect public health with an adequate margin of safety'' and the secondary standard ''requisite to protect public welfare against any known or anticipated adverse effects.'' EPA's task is to establish standards that are neither more nor less stringent than necessary for the purposes of protecting public health or welfare. *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 473. Under established legal interpretation, the costs of implementation associated with various potential levels cannot be factored into setting a primary or secondary standard.[230] Any determinations by the EPA Administrator regarding the appropriate level (and other elements of) of a NAAQS for GHGs must based on the available scientific evidence of adverse public health and/or public welfare impacts, without consideration of the costs of implementation.

EPA expects it would be difficult to determine what levels and other elements of NAAQS would meet these criteria for GHGs, given that the full effects associated with elevated atmospheric concentrations of these

[230] The Supreme Court has confirmed EPA's long-standing interpretation and ruled that ''[t]he text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process.'' The court also noted that consideration of costs occurs in the state's formulation of the implementation plan with the aid of EPA cost data. *Whitman* v. *American Trucking Associations*, 531 U.S. at 472.

pollutants occur over a long period of time and there are significant uncertainties associated with the health or welfare impacts at any given concentration. The delayed nature of effects and the complex feedback loops associated with global climate change would require EPA to consider both the current effects and the future effects associated with current ambient concentrations. In making a determination of what standard is sufficient but not more stringent than necessary, EPA would also have to grapple with significant scientific uncertainty. As with other NAAQS, however, the iterative nature of the 5-year review cycle means the standards could be revised as appropriate in light of new scientific information as it becomes available. EPA requests comment on the scientific, technical, and policy challenges of determining appropriate levels for NAAQS for GHG pollutants, for both primary and secondary standards.

As with all pollutants for which EPA establishes NAAQS, EPA would need to evaluate what constitutes an ''adverse'' impact in the climate context. EPA notes that the 1992 UNFCCC calls for the avoidance of ''dangerous anthropogenic interference with the climate system.'' However, it is possible that the criteria for setting a NAAQS may call for protection against risks and effects that are less egregious than ''dangerous interference.'' Furthermore, international agreement has not been reached on either the metric (e.g., atmospheric concentrations of the six major directly emitted anthropogenic GHGs, radiative forcing, global average temperature increase) or the level at which dangerous interference would occur. EPA requests comment on whether it would be appropriate, given the unique attributes of GHGs and the significant contribution to total atmospheric GHG contributions from emissions emanating outside the United States, to establish a level for a GHG NAAQS based on an internationally agreed-upon target GHG level, considering legal and policy factors.

Another key question is the geographical extent of the human health and welfare effects that should be taken into consideration in determining what level and other elements of a standard would provide the appropriate protection. The pollutants already subject to NAAQS are typically local and/or regional in nature, so the standards are designed to limit ambient concentrations of pollutants associated with emissions typically originating in and affecting various parts of the United States. In assessing what standard is requisite to protect either public health or welfare, EPA has focused in the past on analyzing and addressing the impacts in the United States. It may be appropriate to interpret the Act as requiring standards that are requisite for the protection of U.S. public health and welfare. However, atmospheric concentrations of GHGs are relatively uniform around the globe, the impacts of climate change are global in nature, and these effects, as described in section V, may be unequally distributed around the world. The severity of impacts in the U.S. might differ from the severity of impacts in the rest of the world. In light of these factors, EPA invites comment on whether it would be appropriate to consider adverse effects on human health and welfare occurring outside the U.S. Specifically, we invite comment on whether, and if so, on what legal basis, it would be appropriate for EPA to consider impacts occurring outside the U.S. when those impacts, either in the short or long term, may reasonably be anticipated to have an adverse effect on health or welfare in the U.S.

As noted briefly above, if each GHG is listed as a separate pollutant under section 108, rather than as a group or category of pollutants, then EPA arguably would have to establish separate NAAQS for each listed GHG. This scenario raises significant challenges for determining which level of any particular standard is appropriate, especially as the science of global climate change is generally focused on the total radiative impact of the combined concentration of GHGs in the atmosphere. Since for any one pollutant, the standard that is requisite to protect public health with an adequate margin of safety or public welfare from known or anticipated adverse effects is highly dependent upon the concentration of other GHGs in the atmosphere, it would be difficult to establish independent standards for any of the six principal GHGs. EPA requests comments on possible approaches for determining appropriate levels for GHG NAAQS if these pollutants are listed individually under section 108.

ii. Indicator

If each GHG is listed as an individual pollutant under section 108, the atmospheric concentration of each pollutant could be measured separately, and establishing an indicator for each pollutant would be straightforward. However, if GHGs are listed as a group, it would be more challenging to determine the appropriate indicator for use in measuring ambient air quality in comparison to a GHG NAAQS. One approach could be to measure the total atmospheric concentration of a group of GHGs on a CO_2 equivalent basis, by assessing their total radiative forcing (measured in W/m^2).[231] Radiative forcing is a measure of the heating effect caused by the buildup of the GHGs in the atmosphere. Estimating CO_2-equivalent atmospheric concentrations, however, would not be a simple matter of multiplying emissions times their respective GWP values. Rather, the heating effect (radiative forcing) due to concentrations of each individual GHG would have to be estimated to define CO_2-equivalent concentrations. EPA invites comment on the extent to which radiative forcing could be an effective metric for capturing the heating effect of all GHGs in a group (or for each GHG individually). For example, in the year 2005 global atmospheric CO_2 concentrations were 379 parts per million (ppm), but the CO_2-equivalent concentration of all long-lived GHGs was 455 ppm. This approach would not require EPA to specify the allowable level of any particular GHG, alone or in relation to the concentration of other GHGs present in the atmosphere.

A second option would be to select one GHG as the indicator for the larger group of pollutants intended to be controlled under the standard. This kind of indicator approach is currently used in regulating photochemical oxidants, for which ozone is the indicator, and oxides of nitrogen, for which NO_2 has been used as an indicator. There are several reasons, however, that this approach may not be appropriate for GHGs. For example, in the instances noted above, the indicator species is directly related to the other pollutants in the group, either through common precursors or similar chemical composition, and there is a basis for expecting that control of the indicator compound will lead to the appropriate degree of control for the other compounds in the listed pollutant. In the case of GHGs, it would be more difficult to select one species as the indicator for the larger group, given that the GHGs are distinct in origin, chemical composition, and radiative forcing, and will require different control strategies. Furthermore, this approach raises an issue regarding whether states would have the appropriate incentive to address all pollutants within the group. For example, there could be a focus on controlling the single indicator species at the expense of other species also associated with the adverse effects from

[231] See footnote 13 for an explanation of CO_2 equivalency.

which the standard(s) are designed to offer protection.

EPA seeks comment on the merits and drawbacks of these various approaches, as well as suggestions for other possible approaches, to defining an indicator for measuring allowable concentrations of GHGs in the atmosphere.

c. Section 107: Area Designations

After EPA establishes or revises a NAAQS, the CAA requires EPA and the states to begin taking steps to ensure that the new or revised NAAQS are met. The first step is to identify areas of the country that do not meet the new or revised NAAQS. This applies to both the primary and secondary NAAQS. EPA is required to identify each area of the country as ''attainment,'' ''nonattainment,'' or ''unclassifiable.'' [232]

For a GHG NAAQS, the designations given to areas would depend on the level of the NAAQS and the availability of ambient data to make informed decisions for each area. For GHGs, in contrast to current NAAQS pollutants, it would likely make sense to conduct the air quality assessment at the national scale rather than at a more localized scale. All of the potential indicators discussed above for measuring ambient concentrations of GHGs for purposes of a NAAQS involve globally averaged metrics. Therefore, the ambient concentrations measured across all locations within the U.S. for purposes of comparison to the level of the standard would not vary, and all areas of the country would have the same designation—that is, the entire U.S. would be designated either attainment or non-attainment, depending on the level of the NAAQS compared to observed GHG ambient concentrations.

If, in making decisions about the appropriate level of the GHG NAAQS, EPA were to determine that current ambient concentrations are not sufficient to cause known or anticipated adverse impacts on human health or welfare now or in the future, then it is possible that the NAAQS would be set at some level higher than current ambient concentrations. In that case, the entire country would likely be designated nonattainment. If, on the other hand, EPA were to set the NAAQS at a level above current ambient concentrations, the entire country would likely be designated attainment.

d. Section 110: State and Federal Implementation Plans

i. State Implementation Plans

The CAA assigns important roles to EPA, states, and tribal governments in implementing NAAQS and in ensuring visibility protection in Class I areas. States have the primary responsibility for developing and implementing state implementation plans (SIPs). A SIP is the compilation of authorities, regulations, control programs, and other measures that a state uses to carry out its responsibilities under the CAA to attain, maintain, and enforce the NAAQS and visibility protection goals, and to prevent significant deterioration of air quality in areas meeting the standard. Additional specifics on SIP requirements are contained in other parts of the CAA.

EPA assists states and tribes in their efforts to clean the air by promulgating national emissions standards for mobile sources and selected categories of stationary sources. Also, EPA assists the states in developing their plans by providing technical tools, assistance, and guidance, including information on potentially applicable emissions control measures.

Historically, the pollutants addressed by the SIP program have been local and regional pollutants rather than globally mixed pollutants like GHGs. The SIP development process, because it relies in large part on individual states, is not designed to result in a uniform national program of emissions controls.

(1) Generic Requirements for All SIPs

This section discusses the specific CAA requirements states must address when implementing any new or revised NAAQS.[233]

Under section 110(a)(1) and (2) of the CAA, all states are required to submit plans to provide for the implementation, maintenance, and enforcement of any new or revised NAAQS. Section 110(a)(1) and (2) require states to address basic program elements, including requirements for emissions inventories, monitoring, and modeling, among other things. These requirements apply to all areas of the state regardless of whether those areas are designated nonattainment for the NAAQS.

In general, every state is required to submit to EPA within 3 years of the promulgation of any new or revised NAAQS a SIP demonstrating that these basic program elements are properly addressed. Subsections (A) through (M) of section 110(a)(2) enumerate the elements that a state's program must contain. See the Stationary Source TSD for this list.

Other statutory requirements for state implementation plans vary depending on whether an area is in nonattainment or attainment. There are four specific scenarios that could hypothetically apply, depending on whether a primary or a secondary standard, or both, are established, and on the level(s) set for those standards. Because we are proposing no scientific determinations in this notice, our discussion of NAAQS implementation addresses all four of these scenarios.

(2) Scenario 1: Primary GHG Standard With Country in Nonattainment

If the entire country were designated nonattainment for a primary GHG NAAQS, each state would be required to develop and submit a SIP that provided for attainment and met the other specific requirements of Part D of Title I of the Act by the specified deadline.

Requirements for the general contents of a nonattainment area plan are set forth in section 172 of the CAA. Section 172(c) specifies that SIPs must, among other things: [234]

- Include all Reasonably Available Control Measures (RACM) (including, at a minimum, emissions reductions obtained through adoption of Reasonably Available Control Technology (RACT)) and provide for attainment of the NAAQS;
- Provide for Reasonable Further Progress (RFP), which means reasonable interim progress toward attainment;
- Include an emissions inventory;
- Require permits for the construction and operation of major new or modified stationary sources, known as

[232] CAA Section 107(d)(1) requires EPA to establish a deadline for states to submit recommendations for area designations that is no later than one year after promulgation of the new or revised NAAQS. Section 107(d)(1) also directs states to recommend appropriate area boundaries. A nonattainment area must consist of that area that does not meet the new or revised NAAQS, and the area that contributes to ambient air quality in a nearby area that does not meet the new or revised NAAQS. Thus, a key factor in setting boundaries for nonattainment areas is determining the geographic extent of nearby source areas contributing to the nonattainment problem. EPA then reviews the states' recommendations, collects and assesses additional information as appropriate, and issues final designations no later than 2 years following the date EPA promulgated the new or revised NAAQS. EPA may take one additional year (meaning final designations can be up to 3 years after promulgation of new or revised NAAQS) if the Administrator has insufficient information to promulgate the designations. Whether or not a state or a Tribe provides a recommendation, EPA must promulgate the designation that it deems appropriate.

[233] The visibility protection program required by CAA sections 169A and 169B, and as implemented through state compliance with EPA's 1999 Regional Haze Rule, will only be raised again here in this section of the ANPR in the context of a framework for implementing a secondary GHG NAAQS.

[234] For additional information about nonattainment area planning requirements, please see the Technical Support Document.

''nonattainment new source review'' (see also section 173 of the Act and section VII.E. of this notice);

• Contain contingency measures that are to be implemented in the event the air quality standard is not met by the area's attainment deadline; and

• Meet the applicable provisions of section 110(a)(2) of the CAA related to the general implementation of a new or revised NAAQS.

In addition, all nonattainment areas must meet requirements of section 176(c) known as ''general conformity'' and ''transportation conformity.'' [235] In brief, general conformity requires the federal government only to provide financial assistance, issue a permit or approve an activity that conforms to an approved SIP for a NAAQS. Transportation conformity requires metropolitan planning organizations and the U.S. Department of Transportation only to approve or fund transportation plans, programs and projects that conform to an approved SIP for a NAAQS. For the scenario of the country in nonattainment with a GHG NAAQS, these requirements would apply nationwide one year after the effective date of EPA's nonattainment designations.

For nonattainment areas, SIPs must provide for attainment of the primary NAAQS as expeditiously as practicable, but no later than 5 years from the effective date of the nonattainment designation for the area—or no later than 10 years if EPA finds additional time is needed considering the severity of nonattainment and the availability and feasibility of pollution control measures.

At the outset, it would appear to be an inescapable conclusion that the maximum 10-year horizon for attaining the primary NAAQS would be ill-suited to GHGs. The long atmospheric lifetime of the six major emitted GHGs means that atmospheric concentrations will not quickly respond to emissions reduction measures (with the possible exception of methane, which has an atmospheric lifetime of approximately a decade). In addition, in the absence of substantial cuts in worldwide emissions, worldwide concentrations of GHGs would continue to increase despite any U.S. emission control efforts. Thus, despite active control efforts to meet a NAAQS, the entire U.S. would remain in nonattainment for an unknown number of years. If States were unable to develop plans demonstrating attainment by the required date, the result would be long-term application of sanctions, nationwide (e.g., more stringent offset requirements and restrictions on highway funding), as well as restrictions on approvals of transportation projects and programs related to transportation conformity. EPA is currently evaluating the extent to which section 179B might provide relief to states in this circumstance. As further explained below, section 179B is a waiver provision providing for SIP approval under certain circumstances when international emissions affect a U.S. nonattainment area.

In addition to submitting plans providing for attainment within the state, each state would be required to submit, within 3 years of NAAQS promulgation, a plan under section 110(a)(2)(D) prohibiting emissions that would significantly contribute to nonattainment in another state. EPA requests comments on what approaches could be utilized for purposes of addressing this requirement as well as the general matter of controlling GHGs to meet a NAAQS.

Impact of section 179B on nonattainment requirements: States may use section 179B of the CAA to acknowledge the impact of emissions from international sources that may contribute to violations of a NAAQS. Section 179B provides that EPA shall approve a SIP for a nonattainment area if: (1) The SIP meets all applicable requirements of the CAA; and (2) the submitting state can satisfactorily demonstrate that ''but for emissions emanating from outside of the United States,'' the area would attain and maintain the applicable NAAQS. EPA has historically evaluated these ''but for'' demonstrations on a case-by-case basis, based on the individual circumstances and the data provided by the submitting state. These data might include ambient air quality monitoring data, modeling scenarios, emissions inventory data, and meteorological or satellite data. In the case of GHGs, however, where global emissions impact all areas within the United States, the federal government may be best suited for establishing whether a ''but for'' demonstration can be made for the entire country.

If a ''but for'' conclusion is affirmed, section 179B would allow EPA to approve a SIP that did not demonstrate attainment or maintenance of the relevant NAAQS. Section 179B does not provide authority to exclude monitoring data influenced by international transport from regulatory determinations related to an area's status as an attainment or nonattainment area. Thus, even if EPA approves a section 179B ''but for'' demonstration for an area, the area would continue to be designated as nonattainment and subject to certain applicable nonattainment area requirements, including nonattainment new source review, conformity, and other measures prescribed for nonattainment areas by the CAA. EPA requests comment on the practical effect of application of section 179B on the global problem of GHG emissions and on the potential for controls based on the attainment plan requirement and other requirements directly related to the attainment requirement, including the reasonable further progress requirement and the RACM requirement.[236]

(3) Scenario 2: Secondary Standard With Country in Nonattainment (No Primary Standard)

As noted above in the NAAQS standard-setting discussion, depending on the nature and bases of any endangerment finding under section 108, EPA may be able to consider setting only a secondary NAAQS for GHGs and not also a primary NAAQS.

In general, the same nonattainment requirements that apply to SIPs for a primary standard apply for a secondary standard, including nonattainment new source review and the other programs listed under the Scenario 1 subsection above.

A notable difference in nonattainment requirements for primary and secondary standards is the time allowed for attainment. Under a secondary standard, state plans must achieve attainment as expeditiously as practicable, but there is no statutory maximum date for attainment. The general requirement to attain as expeditiously as practicable includes consideration of required controls, including ''reasonably available control measures.'' These requirements do allow for consideration of cost. What would constitute ''as expeditiously as practicable'' would be determined based on the entire set of facts and circumstances at issue. EPA requests comment on how to interpret

[235] These requirements also apply to ''maintenance areas''—former nonattainment areas that have met the standard and been redesignated according to a formal EPA determination.

[236] EPA has interpreted RACM as emissions reducing measures that are technically and economically feasible, and considered collectively would advance the nonattainment area's attainment date by at least one year. RACT has been interpreted in two different ways, depending on the applicable statutory requirements. In the case of ozone, RACT consists of measures that are technically and economically feasible, without regard to whether the measures would result in earlier attainment. In recent rules on PM2.5, EPA interpreted RACT for PM2.5 as essentially the same as RACM, with RACT referring to the stationary source component of RACM, which applies to all types of sources.

the requirement that state plans demonstrate that attainment will be achieved ''as expeditiously as practicable'' in the context of a secondary NAAQS for GHGs.

Potential implementation approach based on regional haze model: For a secondary GHG NAAQS with no prescribed attainment date, EPA requests comment on the concept of implementing a GHG secondary NAAQS standard in a way roughly analogous to an approach used in the long-term regional visibility program, known as the regional haze program. This program is based on a goal of achieving natural visibility conditions in our nation's parks and wilderness areas (Class I areas) by 2064. The program requires states to develop reasonable progress goals every 10 years and implement emissions control programs to achieve those goals, ultimately achieving the 2064 natural condition goal in each Class I area. At the midpoint of every 10-year period, states must assess the progress being made and take corrective action if necessary to maintain reasonable progress toward the 10-year progress milestone.

The regional haze program's model for goal planning, control strategy development, and control strategy implementation could offer a possible framework for achieving a GHG secondary NAAQS. This framework potentially could be designed to address the RACM, RACT and Reasonable Further Progress requirements, as well as the attainment planning requirement. This framework may also provide a mechanism for implementing a nationwide GHG emissions cap and trade program adopted and implemented through state plans. However, EPA recognizes that the global nature of GHGs and their persistence in the atmosphere make an approach based on ''reasonable'' progress more difficult to implement than in the case of regional haze. For example, despite domestic emissions reductions, it might not be possible to discern improvement in atmospheric concentrations of GHGs due to their relatively long atmospheric lifetimes or to growth in emissions from other countries which could eclipse reductions made in the U.S. We note that using this framework would not provide relief from any of the applicable nonattainment area requirements of the Act. EPA requests comment on whether, and if so how, the regional haze approach could be adapted for use in the GHG context.

(4) Scenarios 3 and 4: Primary and/or Secondary Standard With Country in Attainment

If a primary or secondary GHG NAAQS were set at a level higher than ambient GHG levels at the time of designations, then the country would be in attainment. (See preceding section on NAAQS standard-setting for discussion of this issue.) In this case, a much shorter list of requirements would apply than if the country were in nonattainment.

SIPs would be required to include PSD programs for GHGs, which would require preconstruction permitting of new major sources and significant modifications to existing major sources. (See section VII.D on PSD.)

EPA has identified two other requirements that potentially could apply, both of which could provide authority for a nationwide cap-and-trade program implemented at the state level. First, section 110(a)(1) requires states to submit a SIP providing for ''implementation, maintenance, and enforcement'' of primary and secondary NAAQS. Under the scenario of a GHG NAAQS with the country in attainment, where states may need more than PSD/NSR to maintain attainment, EPA could consider using this provision to require SIPs to provide for maintenance of air quality consistent with the GHG standard. This requirement could be implemented through a nationwide cap-and-trade program designed at the federal level and adopted by individual states in their SIPs, a program similar but broader in scope than existing programs such as the more limited NO_X SIP Call regional cap-and-trade system for EGUs and selected industrial source categories. If a state failed to submit an adequate maintenance SIP, EPA would be required to develop and implement a federal implementation plan for that state. EPA could design the FIP to enable the state to participate in a nationwide cap-and-trade system.

Second, section 110(a)(2)(D) requires SIPs to prohibit emissions that would interfere with maintenance of the standard by other states. Because GHGs are globally well-mixed, it may be that GHGs emitted from any state could be found to interfere with maintenance of a GHG NAAQS in every other state. In the past, EPA has issued rules that have resulted in states adopting interstate cap-and-trade programs (e.g., the Clean Air Interstate Rule) implemented through SIPs to address the requirements of this provision. In the case of GHGs, this authority could potentially support a nationwide cap-and-trade program for GHGs, adopted through SIPs. If a state failed to submit its section 110(a)(2)(D) SIP, EPA would be required to develop and implement a FIP for that state. EPA could design the FIP to enable the state to participate voluntarily in a nationwide cap-and-trade system. We request comment on the suitability of adopting either of these approaches under section 110(a).

ii. Additional CAA Provisions Affecting SIP Obligations and FIPs

(1) Section 179(a)

The CAA requires states to submit SIPs to EPA for review, and EPA must approve or disapprove them based on whether the state plan or component meets the Act's requirements. An EPA finding that a state has failed to submit a nonattainment plan or plan component, or an EPA disapproval of such a plan because it does not meet the requirements of the Act, would start a ''sanctions clock'' under section 179(a). This means that sanctions would apply in the state if the deficiencies are not corrected within prescribed deadlines. These sanctions include additional requirements for major new sources (18 months after the finding of failure) and restrictions on federal highway funds (6 months after the offset sanction).[237] EPA must promulgate a FIP for the deficient component of the SIP if the state's plan component is not approved within 2 years of EPA's finding or disapproval action. In the case of GHGs, it is possible that EPA could design the FIP to enable the state to participate in a nationwide cap-and-trade system.

(2) Section 115

CAA section 115 creates a mechanism through which EPA can require states to amend their SIPs to address international transport issues. It is designed to protect public health and welfare in another country from air pollution emitted in the U.S. provided the U.S. is given essentially reciprocal rights with respect to prevention and control of air pollution originating in the other country. The Administrator could exercise his authority under this provision if EPA were to promulgate a NAAQS for GHG.

To act under section 115, the Administrator would need to make a finding that, based on information from any duly constituted international agency, he has reason to believe that air pollutants (GHGs) emitted in the U.S. causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country. Upon making such a finding, the Administrator would give

[237] 40 CFR 52.31.

formal notification to the Governor of the state (or in this case potentially all of the states) where GHGs originate. A finding under this section has the same regulatory consequences as a finding that the state's existing SIP is inadequate to attain the NAAQS or otherwise meet the requirements of the Act. This notification would require the notified states to modify their SIPs to prevent or eliminate the endangerment.

Addressing GHGs under this authority could allow some flexibility in program design, subject to limitations of the SIP development process. Section 115 could not be used to require states to incorporate into their SIPs measures unrelated to attainment or maintenance of a NAAQS. A factor to consider is that this section of the Act only applies where countries that suffer possible endangerment give reciprocal rights to the U.S. However, reciprocity with one or more affected countries may be sufficient to trigger section 115. We request comment on the efficacy of using section 115 as a mechanism to facilitate more effective regulation of GHGs through a NAAQS.

2. What Sources Would Be Affected?

Sections 108 and 109 impose no controls directly on sources, but instead establish the air quality benchmarks that control requirements would be designed to meet. The precise nature of these controls would be determined through federal and state programs, as established via SIPs and, for states failing to submit an approvable plan, FIPs. Considering that GHGs are emitted by a wide array of sources, it is likely that NAAQS implementation would result in controls on numerous stationary and mobile sources through sections 110 and 172.

The federal government could have less flexibility under the NAAQS approach to target control efforts toward particular groups of existing stationary sources. Under the traditional SIP approach, emissions controls on specific source categories would flow from independent state-level decisions, and could result in a patchwork of regulations requiring different types and levels of controls in different states. However, the SIP approach could also be adapted for use in a more coordinated strategy. As mentioned above, EPA has in the past issued rules that have resulted in states adopting limited interstate cap-and-trade programs (e.g., NO_X SIP Call and the Clean Air Interstate Rule) implemented through state SIPs. Furthermore, the federal government would also have flexibility to design a national control program in the event that states did not adopt the required programs and EPA were required to promulgate a FIP.

EPA requests comment on whether and how the different implementation provisions within the NAAQS program could be adapted to be most suitable for application to control GHGs.

3. What Would Be the Key Milestones and Implementation Timeline?

The key milestones that would apply if EPA were to regulate GHGs as a NAAQS pollutant include: listing the pollutant(s); issuing air quality criteria; issuing information on air pollution control techniques; proposing primary and secondary NAAQS for the pollutants; issuing final standards; designating areas; development of SIPs/FIPs; and application of control measures.

EPA has discretion with regard to the date of listing of a pollutant under section 108. The statute does not prescribe any specific deadline for listing, instead stating that EPA ''shall from time to time * * * list * * * each air pollutant'' that EPA judges meets the three criteria discussed above. This could provide the Agency some latitude in determining the precise timing of any listing.

Once a pollutant is listed, the CAA specifies a very ambitious timeline for issuing the initial NAAQS for the pollutant. Section 108 allows 12 months between date of listing and issuance of air quality criteria for the pollutant(s). Since these criteria are intended to encompass ''all identifiable effects on public health or welfare,'' it would be difficult to meet this timeline in the case of GHGs. In 1970, when the NAAQS program was first established under the CAA, air quality criteria either were in development or had already been issued for a variety of pollutants, and the process involved consideration of a much smaller body of science than is now available. Therefore, the 12-month period allotted for the initial issuance of air quality criteria appeared reasonable.[238] However, based on recent NAAQS reviews for ozone, particulate matter, lead, and other pollutants, it now generally takes several years for the Agency to complete the thorough scientific assessment necessary to issue air quality criteria.

Given the complexity of global climate change science, and the vast amount of research that would be relevant to the Agency's scientific assessment, EPA anticipates this task would be particularly time consuming in the case of GHGs, though relying on synthesis reports such as the Intergovernmental Panel on Climate Change's Fourth Assessment Report and various reports of the U.S. Climate Change Science Program could help expedite the process. The challenge of completing a thorough scientific assessment for GHGs could result in a significant delay in listing the pollutant(s) under section 108, since EPA would likely choose to list GHGs only when the scientific assessment had progressed sufficiently to enable the Agency to meet the statutory requirement to issue ''air quality criteria'' within one year of listing, and to meet the tight rulemaking timeframe, discussed below. To the extent that EPA addresses GHGs through this CAA mechanism, EPA requests comments on the issuance of ''air quality criteria'' following listing, as well as the adequacy of the available scientific literature.

Under section 109, EPA must propose NAAQS for any newly listed pollutant at the same time it issues air quality criteria under section 108, and must finalize those standards within 90 days after proposal. Thus, from the date of listing a pollutant(s) under section 108, the Agency has only 12 months to propose standards, and only 3 additional months to issue final NAAQS for the pollutant(s). This tight timeframe would be particularly challenging in the case of GHGs, for which review and synthesis of an enormous body of literature would be required before a proposal could be issued. Furthermore, it is important to note that while subsequent NAAQS reviews of existing standards are required on a revolving 5-year cycle, EPA has found it challenging to meet even this extended schedule, which generally allows 9–12 months between issuance of the air quality criteria and proposal and an additional 6 months or more for issuance of final standards.

Once a new standard has been established, the CAA allows EPA to establish a deadline for states to submit designation recommendations that is no later than one year after promulgation of the new or revised NAAQS. EPA then reviews the states' recommendations, collects and assesses additional information as appropriate, and issues final designations no later than 2 years following the date EPA promulgated the new or revised NAAQS. EPA may take up to one additional year if the Administrator has insufficient

[238] For each air pollutant for which air quality criteria had already been issued prior to enactment of the Clean Air Act Amendments of 1970, section 109(a)(1) actually required EPA to issue proposed NAAQS within 30 days of enactment and to finalize those standards within 90 days of publication of the proposal. This included carbon monoxide, ozone, particulate matter, hydrocarbons, and sulfur oxides.

information to promulgate the designations, which could push the date of final designations out to three years after promulgation of a new GHG NAAQS.

The timeline for SIP submittal and implementation of control requirements depends an area's designation status (attainment, nonattainment, unclassifiable) and whether there is only a secondary NAAQS, or both a primary and a secondary standard. These various scenarios are described above. As a first step, regardless of attainment status of level of the standard, states must submit infrastructure SIPs to EPA within 3 years of the promulgation of any new or revised NAAQS. These SIPs demonstrate that certain basic program elements (including emissions inventories, monitoring, and modeling) are properly addressed. Areas that are designated attainment would face a much shorter list of requirements, which are discussed above in the context of, Scenarios 3 and 4.

For areas designated nonattainment with a primary standard, states must submit nonattainment SIPs no more than 3 years after the effective date of designations, and must reach attainment no later than 5 years after the effective date designations. EPA can extend the attainment deadline by up to an additional 5 years—i.e., to no later than 10 years after the effective date of designations, if EPA finds additional time is needed considering the severity of nonattainment and the availability and feasibility of pollution control measures.

As noted above, the maximum 10-year horizon for attaining the primary NAAQS is ill-suited to pollutants such as GHGs with long atmospheric residence times. It is probable that, despite active control efforts, the entire U.S. would remain in nonattainment for an indefinite number of years if the level of a NAAQS were set at or below current atmospheric concentrations; whether attainment would ever be reached would depend on the timing and stringency of GHG control measures implemented on a global basis.

For areas designated nonattainment with a secondary standard only, the attainment schedule could be significantly longer. The CAA requires that state plans under a secondary standard must provide for reaching attainment as expeditiously as practicable, but there is no statutory maximum date for attainment (e.g., up to 10 years). EPA requests comment on the suitability of adapting this approach for use in the GHG context, and specifically, on the schedule that could reasonably be considered as ''expeditious as practicable.'' We also request comment on how global emissions should be taken into consideration in this context.

EPA requests comment on whether the avenues discussed in this notice, or alternative approaches, could facilitate schedule adjustments that would better enable use of the NAAQS approach for regulating GHGs.

4. What Are Key Considerations Regarding Use of This Authority for GHGs?

a. Possible Cost and Emissions Impacts

Listing GHGs as pollutants under section 108 and setting NAAQS under section 109 would have no direct cost or emissions impacts. However, these actions would trigger further federal actions, including designations under section 107, and state or federal actions through SIPs or FIPs developed under section 110 and other provisions in title I of the CAA. Thus, the listing of GHGs as NAAQS pollutants would likely lead to the adoption of a substantial control program affecting sources across the nation.

Because establishing NAAQS for a pollutant sets in motion a broad and prescriptive implementation process that could affect a wide array of stationary and mobile sources, it is likely to entail substantial costs. The magnitude of these costs would depend, in part, on the relative reliance on technologies which are not yet suitable for commercial application or which have not yet been developed. Though this problem affects other pollutants, it is more acute in the case of GHGs. The timing and nature of controls instituted, and thus the costs, would depend to a significant extent on an area's designation status and whether EPA set only a secondary NAAQS (with a longer implementation time horizon), or a primary standard as well (with a more rapid and rigid compliance schedule, allowing less time for technological advances and efficiency improvements). The standard set and the nature of GHGs could also determine whether it is feasible to attain a NAAQS in the near-term, or how costly attainment could be over a longer term.

One important aspect of the NAAQS approach is that the standards themselves (both primary and secondary) are established without consideration of these costs. EPA requests comment on the suitability of establishing regulations to limit atmospheric concentrations of GHGs through a statutory mechanism that prohibits consideration of the costs such regulations might entail. EPA also requests comment on the extent to which various implementation mechanisms in Title I are available for addressing such costs.

As mentioned above, CAA section 108 requires EPA to issue information on air pollution control techniques at the same time it issues air quality criteria. This would include information on the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impacts. Generally, the Agency fulfills this obligation at the time a standard is issued; as required under Executive Order 12866, EPA must issue an RIA for major rulemaking actions. A NAAQS RIA provides an illustrative analysis of control options available to reduce emissions and ambient concentrations of the regulated pollutant(s); evaluates the costs of these controls; and estimates the human health and environmental benefits likely to accrue from the improved air quality resulting from the standards.

As required by EO 12866 and guidance from OMB, the analysis generally compares control options and estimated costs and benefits of multiple, specific standard options under consideration. While EPA recognizes the cost estimates for future GHG control technologies would potentially place more reliance on yet-to-be-developed options, the precedent exists for consideration of future, unknown controls. EPA requests comment on whether there are important distinctions between GHGs and previously regulated criteria pollutants that would make it appropriate in the case of a new NAAQS for GHG(s) to issue a separate air pollution control techniques document earlier in the process, specifically in conjunction with the air quality criteria as required by section 108, or whether such information is more useful if tailored to specific standard options under consideration, as in the RIA.

b. Technology Development and Leakage

Two of the policy design considerations noted in section III.F.1 include the potential to promote technology development and to address potential concerns about shifting emissions to other countries. The NAAQS establish standards based on ambient concentrations that must be attained and maintained everywhere, and are implemented through SIPs that establish emissions budgets consistent with meeting the standards. The limited emissions budget encourages state and local areas and affected sources to work together to identify least-cost emissions controls to meet their SIP obligations and reduce ambient concentrations of the regulated pollutant(s). The NAAQS requirements help create market demand for technologies that can assist in meeting air quality standards at the least cost. As discussed in Section III.C of this notice, this process has encouraged significant technological innovation. EPA requests comment on the extent to which the NAAQS can be an effective mechanism for encouraging technological innovation and development of least-cost controls for GHG emissions.

The 10-year maximum timeline for attaining a primary NAAQS would allow some time for development and deployment of emerging technologies, but longer timelines available under other forms of the NAAQS would provide greater flexibility to provide continuous incentives over a longer time period for major technology advances, and more time to deploy new technologies that are developed. EPA requests comment on the extent to which a GHG NAAQS could reasonably be expected to advance new control technologies, and on what timeframe.

With respect to the leakage issue, establishing a primary NAAQS could lead to high costs among affected industries unless a viable approach is identified to limit the control burden on U.S. sources. Because the standards themselves are set without consideration of cost or availability of control technologies, and because states would be required to adopt a plan to attain a primary standard within 10 years of designation, the NAAQS approach might offer less flexibility to delay emissions reductions in the absence of effective control technologies or when costs are prohibitive. This consideration may be particularly relevant in the case of GHGs, where highly efficient control technologies or mitigation options are currently limited, and where critical new control strategies, such as carbon capture and storage, are still in the early stages of development. In these instances, industries that are unable to locate cost-effective control strategies may consider relocating to non-regulated locations, resulting in significant emissions leakage.

We request comment on the cost-effectiveness of utilizing a NAAQS approach to regulating GHGs, and on the extent to which this approach might be expected to result in emissions leakage, especially as compared to other potential regulatory approaches outlined in this notice.

c. Summary of Opportunities and Challenges Afforded by NAAQS Pathway

Regulating GHGs through a NAAQS offers certain opportunities; however, there are also significant technological, legal and program design challenges that would tend to limit the appropriateness of the NAAQS program.

NAAQS are based purely on preventing adverse health and environmental impacts, rather than on considerations of cost, feasibility, or availability of technology. Our expectation is that the NAAQS approach would establish a goal tied to actual ambient concentrations of GHGs. A NAAQS would call for assessment of potential control strategies for a broad array of sources, rather than focusing only on emissions reductions from a specified (but potentially limited) list of sources. The NAAQS approach would allow for some flexibility in the design of control strategies and requirements, including the possibility of a cap-and-trade approach, and might spur significant technological innovation. It would provide a mechanism for reducing GHG emissions from current sources and limiting the growth of emissions from new sources. If the facts supported adopting only a secondary standard, this would somewhat reduce the specific obligations on states, and would allow a suitably extended timeline for achieving the emissions reductions necessary to stabilize and then reduce ambient GHG concentrations.

Though such an approach has the potential to be effective in reducing emissions, there would be a number of obstacles to overcome. Chief among these is that if worldwide (non-U.S.) emissons were to continue increasing, global concentrations of GHGs would continue to increase despite U.S. emission control efforts, and the NAAQS would be unachievable (depending on the level of the standards) even if U.S. emissions were reduced to zero. Unless viable legal approaches could be identified for limiting the control burden on U.S. sources, such as by defining a U.S. share of the emissions reductions needed to attain a NAAQS, the NAAQS approach would result in an expensive program. It would not achieve the adopted GHG NAAQS due to foreign emissions growth, although U.S. emissions reductions would be achieved. If the result of a NAAQS were stringent unilateral controls for vulnerable industries, this would encourage emissions leakage in the absence of comparable control efforts abroad.

Especially if the Agency were to set a primary as well as a secondary standard, a NAAQS would trigger a relatively rigid implementation apparatus, limiting the Agency's flexibility to target cost-effective emissions reductions and to shift the burden of control requirements among different industries based on the availability of new technological approaches. The lack of flexibility allowed under the CAA for many of the NAAQS implementation requirements—especially those affecting areas designated nonattainment with a primary standard—makes them difficult to adapt effectively for application in the GHG context. For example, it would be challenging to apply requirements for transportation conformity under a GHG NAAQS, or for states to develop attainment demonstration SIPs. As discussed in section IV.E, a nonattainment new source review program requiring for GHGs would dramatically expand the scope of the preconstruction permitting program to include smaller sources and new types of sources such as apartment buildings with natural gas heat, unless EPA were successful in applying legal theories that justify deviating from statutory language. This would pose substantial administrative feasibility and cost issues. While implementation of an attainment-level NAAQS would involve fewer specific requirements, this avenue would only apply if the standard set by EPA under section 109 resulted in attainment designations. Section 109 calls for standards to be set based on science-based criteria, which exclude consideration of the cost or efficiency of the implementation requirements in determining the level of the standard.

We note that while the NAAQS implementation system is state-based, legislative proposals have focused on establishing federally administered national cap-and-trade strategies to address the global climate problem.

In closing, we request comment on our assessment of NAAQS approaches, and on how the NAAQS approach compares to other potential CAA approaches in light of the policy principles enunciated in section III.F.1.

5. Possible Implications for Other CAA Provisions

Listing a pollutant under section 108(a)(1) would preclude listing under section 112 or regulation under section 111(d), but would not preclude listing and regulation under section 111(a)–(c) New Source Performance Standards (NSPS) provisions as described below. Similarly, regulation of GHGs under section 111(a)–(c) NSPS provisions, as discussed further in other sections of today's notice, would not preclude regulation of those pollutants through a NAAQS, although controls implemented through these provisions might influence the Agency's perspective on the appropriateness of establishing air quality criteria for GHGs. EPA requests comment on the extent to which regulatory action under section 111 could be considered in the context of exercising authority under section 108 relevant to GHGs.

B. Standards of Performance for New and Existing Sources

CAA section 111 provides EPA with authority to set national performance standards for stationary sources. There are two alternative pathways for using section 111 to regulate GHGs—as part of an implementation program for a GHG NAAQS or as a freestanding program.

- In the event of a GHG NAAQS, section 111 authorizes EPA to set emissions performance standards for new and modified sources but not for unmodified existing sources.
- In the absence of a GHG NAAQS, section 111 offers the potential for an independent, comprehensive program for regulating most stationary sources of GHGs, except to the extent GHG emissions are regulated under section 112

Section 111 provides for consideration of cost, and allows substantial discretion regarding the types and size of sources regulated. As with most other CAA authorities, however, establishment of a section 111 standard for any source category of GHGs would trigger preconstruction permitting requirements for all types of GHG major sources under the PSD program.

The Stationary Source TSD for this ANPR identifies some specific industry sectors that EPA has evaluated for their emissions of multiple pollutants, including GHGs. EPA requests comment on this analysis. In addition, EPA requests comment on GHG emissions from these and all other categories and subcategories that have been subject to section 111 standards and on the relative costs that could be associated with employing certain identified control technology or practices affecting GHG emissions, including any positive or negative impacts on the emissions of traditional pollutants.

1. What Does Section 111 Require?

Section 111 establishes two distinct mechanisms for controlling emissions of air pollutants from stationary sources. Section 111(b) provides authority for EPA to promulgate New Source Performance Standards (NSPS) which may be issued regardless of whether there is a NAAQS for the pollutant being regulated, but apply only to new and modified sources. Once EPA has elected to set an NSPS for new and modified sources in a given source category, section 111(d) calls for regulation of existing sources with certain exceptions explained below. Taken together, the section 111 provisions could allow significant flexibility in regulation that may not be available under other CAA Title I provisions.

a. Section 111(b) New Source Performance Standards

Section 111(b) of the CAA requires EPA to establish emission standards for any category of new and modified stationary sources that the Administrator, in his judgment, finds ''causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' EPA has previously made endangerment findings under this section for more than 60 stationary source categories and subcategories that are now subject to NSPS.[239] An endangerment finding would be a prerequisite for listing additional source categories under section 111(b), but is not required to regulate GHGs from source categories that have already been listed.

For listed source categories, EPA must establish ''standards of performance'' that apply to sources that are constructed, modified or reconstructed after EPA proposes the NSPS for the relevant source category.[240] However, EPA has significant discretion to define the source categories, determine the pollutants for which standards should be developed, identify the facilities within each source category to be covered, and set the level of the standards. In addition, EPA believes that the NSPS program is flexible enough to allow the use of certain market-oriented mechanisms to regulate emissions, as discussed below.

As implemented over many years by EPA, the NSPS program has established standards that do not necessarily set emission limits for all pollutants or even all regulated pollutants emitted by sources within the relevant source category. Rather, the NSPS generally focus on specific pollutants of concern for a particular source category. Air pollutants currently regulated through section 111(b) include the criteria pollutants listed under section 108 and certain additional pollutants. These additional pollutants are acid mist, fluorides, hydrogen sulfide in acid gas, total reduced sulfur, and landfill gas. EPA has discretion to revise an existing NSPS to add standards for pollutants not currently regulated for that source category, but has interpreted the section to not require such a result when an NSPS is reviewed pursuant to section 111(b)(1)(B). That section requires EPA to review and, if appropriate, revise NSPS every eight years unless the Agency determines that such review is not appropriate in light of readily available information on the efficacy of the standard.

Further, in contrast to other provisions in the CAA which require regulation of all sources above specific size thresholds, section 111 gives EPA significant discretion to identify the facilities within a source category that should be regulated. To define the affected facilities, EPA can use size thresholds for regulation and create subcategories based on source type, class or size. Emission limits also may be established either for equipment within a facility or for an entire facility.

EPA also has significant discretion to determine the appropriate level for the standards. Section 111(a)(1) provides that NSPS are to ''reflect the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.'' This level of control is commonly referred to as best demonstrated technology (BDT). In determining BDT, we typically conduct a technology review that identifies what emission reduction systems exist and how much they reduce air pollution in practice. This allows us to identify potential emission limits. Next, we evaluate each limit in conjunction with costs, secondary air benefits (or disbenefits) resulting from energy

[239] EPA has developed NSPS for more than 70 source categories and subcategories. However, endangerment findings apply to the categories as a whole, while subcategories within them have been established for purposes of creating standards that distinguish among sizes, types, and classes of sources.

[240] Specific statutory and regulatory provisions define what constitutes a modification or reconstruction of a facility. 40 CFR 60.14 provides that an existing facility is modified, and therefore subject to an NSPS, if it undergoes ''any physical change in the method of operation . . . which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.'' 40 CFR 60.15, in turn, provides that a facility is reconstructed if components are replaced at an existing facility to such an extent that the capital cost of the new equipment/components exceed 50 percent of what is believed to be the cost of a completely new facility.

requirements, and non-air quality impacts such as solid waste generation. The resultant standard is commonly a numerical emissions limit, expressed as a performance level (i.e., a rate-based standard). While such standards are based on the effectiveness of one or more specific technological systems of emissions control, unless certain conditions are met, EPA may not prescribe a particular technological system that must be used to comply with a NSPS. Rather, sources remain free to elect whatever combination of measures will achieve equivalent or greater control of emissions.

It is important to note that under section 111, the systems on which a standard is based need only be ''adequately demonstrated'' in EPA's view such that it would be reasonable to apply them to the regulated category. The systems, and corresponding emission rates, need not be actually in use or achieved in practice at potentially regulated sources or even at a commercial scale. Further, EPA believes that if a technology is ''adequately demonstrated'' for use at a date in the future, EPA could establish a future-year standard based on that technology. This would allow EPA to develop two- or multi-phased standards with more stringent limits in future years that take into account and promote the development of technology.

Costs are also considered in evaluating the appropriate standard of performance for each category or subcategory. We generally compare control options and estimated costs and emission impacts of multiple, specific emission standard options under consideration. As part of this analysis, we consider numerous factors relating to the potential cost of the regulation, including industry organization and market structure; control options available to reduce emissions of the regulated pollutant(s); and costs of these controls. Frequently, much of this information is presented in the Regulatory Impact Analysis (RIA) that is required for all major rulemaking actions.

b. Section 111(d) Emissions Guidelines for Existing Sources

Section 111(d) requires regulation of existing sources in specific circumstances. Specifically, where EPA establishes a NSPS for a pollutant, a section 111(d) standard is required for existing sources in the regulated source category except in two circumstances. First, section 111(d) prohibits regulation of a NAAQS pollutant under that section. Second, ''where a source category is being regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP listed under 112(b) that may be emitted from that particular source category.'' [241]

Section 111(d) also uses a different regulatory mechanism to regulate existing sources than section 111(b) uses for new and modified sources in a source category. Instead of giving EPA direct authority to set national standards applicable to existing sources in the source category, section 111(d) provides that EPA shall establish a procedure for states to issue performance standards for existing sources in that source category. Under the 111(d) mechanism, EPA first develops regulations known as ''emission guidelines.'' These may be issued at the same time or after an NSPS for the source category is promulgated. Although called ''guidelines,'' they establish binding requirements that states are required to address when they develop plans to regulate the existing sources in their jurisdictions. These state plans are similar to state implementation plans and must be submitted to EPA for approval. Historically, EPA has issued model standards for existing sources that could then be adopted by states. Under this approach, creating an interstate trading system would require adoption of compatible state rules promoted by EPA rules and guidance. In the event that a state does not adopt and submit a plan, EPA has authority to then issue a federal plan covering affected sources.

Section 111(d) guidelines, like NSPS standards, must reflect the emission reduction achievable through the application of BDT. However, both the statute and EPA's regulations implementing section 111(d) recognize that existing sources may not always have the capability to achieve the same levels of control at reasonable cost as new sources. The statute and EPA's regulations in 40 CFR 60.24 permit states and EPA to set less stringent standards or longer compliance schedules for existing sources where warranted considering cost of control; useful life of the facilities; location or process design at a particular facility; physical impossibility of installing necessary control equipment; or other factors making less stringent limits or longer compliance schedules appropriate.

2. What Sources Could Be Affected?

Section 111 has been used to regulate emissions of traditional and nontraditional air pollutants from a broad spectrum of stationary source categories. EPA has already promulgated NSPS for more than 70 source categories and subcategoriesand we could add GHG emission standards, as appropriate, to the standards for existing source categories.[242] EPA has begun a review of the existing NSPS source categories to determine whether it would be appropriate to regulate GHG emissions from sources in each category. In addition, EPA is in the process of responding to a remand from the D.C. Circuit requiring it to consider whether to add standards for GHGs to the NSPS for utility boilers, and EPA has received suggestions that it would be appropriate to add such standards to the NSPS for Portland cement kilns.[243]

To determine whether regulation of GHGs is appropriate for existing categories, we must evaluate whether it is reasonable to do so given the magnitude of emissions and availability of controls, considering the costs of control. Decisions in this regard could be influenced by several factors, including the magnitude of the GHG emissions from a source category; the potency of the particular GHG emitted; whether emissions are continuous, seasonal or intermittent; the availability of information regarding the category's GHG emissions; and whether regulating GHG emissions from the source category would be beneficial. EPA requests comment on the extent to which these factors should, if at all, influence EPA's decisions whether to add standards to existing NSPS and what additional factors should be taken into consideration. EPA also requests

[241] *See* 70 FR 15994, 16029–32 (Mar. 29, 2005).

[242] Some of the existing source categories are very broad, comprising an entire industrial process such as steel making, while others are narrowly defined as a single piece of equipment within a broader production process. Examples of source categories subject to NSPS are fossil fuel-fired boilers, incinerators, sulfuric acid plants, petroleum refineries, lead smelters, and equipment leaks of VOCs in the synthetic organic chemicals manufacturing industry. A complete list of the NSPS source categories is found at 40 CFR part 60.

[243] The NSPS for Petroleum Refineries were recently amended, resulting in the promulgation of new Subpart Ja. These performance standards include emission limitations and work practice standards for fluid catalytic cracking units, fluid coking units, delayed coking units, fuel gas combustion devices, and sulfur recovery plants. As such, they regulate criteria pollutant emissions from the processes that are also responsible for most of the refinery GHG emissions. During the public comment period for Subpart Ja, we received several comments in favor of developing new source performance standards to address GHG emissions from refineries. However, we declined to adopt standards for GHG emissions in that rulemaking, in part because while doing so was within our discretion, we believed that it was important to fully consider the implications for programs under other parts of the CAA before electing to regulate GHG under section 111. This is a fundamental purpose for today's notice and request for comments.

comment on which of the previously regulated categories might be appropriate for GHG regulation and on the information on which such judgments might be based.

To inform the public of EPA's analytical work to date, we have provided descriptions of key industrial sectors, their GHG emissions, and information that we have collected to date on GHG control options for those sectors in the Stationary Source TSD in the docket for today's notice. It is important to note that, as described further in the technical support materials, many near-term technologies or techniques for reducing GHG, e.g., energy efficiency or process efficiency improvements, are relatively cost effective and achieve modest emission reductions when compared with the potential of some add-on control techniques. Other controls may become available in the future whose costs and emission reduction effectiveness may differ substantially from what is discussed here today. The Stationary Source TSD also discusses various mechanisms, such as cap-and-trade programs or emissions averaging approaches across facilities or industries, that can help reduce costs of reducing emissions. EPA requests comment on the availability and extent of its legal authority for such mechanisms.

In addition to regulating GHGs from previously listed source categories, section 111 provides discretionary authority to list new source categories, or reformulate listed source categories, for purposes of regulating of GHG emissions. For example, such categories could include sources of emissions covered by existing NSPS source categories as well as sources not currently covered by any NSPS. One option available to EPA is the reorganization of source categories for purposes of GHG regulation. In creating new categories to be used for regulation of GHGs, EPA could consider factors unique to GHG emissions. For example, EPA could take into account concerns about emissions leakage (discussed in section III.F.5 of this notice), and structure categories to minimize opportunities for shifting emissions to other source categories. EPA could also explore how the rearrangement of source categories could facilitate netting arrangements through which a more broadly defined ''source'' could avoid triggering an GHG NSPS by off-setting its increased GHG emissions.[244] In addition, EPA could structure categories to take into account possible reductions from improvements at non-emitting parts of the plants, for example, by creating source categories that cover all equipment at particular plants, instead of using categories that cover only specific types of equipment at a plant. EPA invites comment on whether such rearrangement would be appropriate and what type of rearrangement would be desirable. We also solicit information on how rearrangement could facilitate netting and how we might structure such netting.

An alternative, or complementary, scenario would be to create larger ''super-categories'' covering major groupings of stationary sources of GHG emissions. For example, it might be possible to create process-based categories (*i.e.,* all sources emitting CO_2 through a stack as a result of combustion processes) or vertically integrated categories which take more of a life-cycle approach to the control of GHG emissions and reduce the possibility of leakage of GHG reductions to other parts of the economy or other geographic regions.[245] The creation of such ''super-categories'' might provide additional opportunities for the development of innovative control mechanisms such as cap-and-trade programs covering multiple industry sectors. In light of these considerations, EPA requests comment on whether the creation of such ''super categories'' would be appropriate and what categories would be most useful for regulating GHGs.

Under either option, EPA possesses authority to distinguish among classes, types and sizes of sources within existing categories for purposes of regulating GHG emissions. For example, we have at times distinguished between new and modified/reconstructed sources when setting the standards. This may be appropriate, for instance, when a particular new technology may readily be incorporated into a new installation, but it may be technically infeasible or unreasonably costly to retrofit this technology to an existing facility undergoing modification or reconstruction. Alternatively, we have distinguished among sources within a category, for instance fossil fuel-fired boilers, for which we have subcategorized on the basis of fuel types (*e.g.*, coal, oil, natural gas). EPA requests comment on what considerations are relevant to determining whether it is appropriate and reasonable to establish subcategories for regulation under section 111.

3. What Are Possible Key Milestones and Implementation Timelines?

a. Priority Setting Among Source Categories

If EPA were to pursue section 111 regulation of GHGs, timetables for regulation would depend upon how EPA prioritized among source categories to determine which categories should be regulated first. In the near term, it may be possible to address GHGs under section 111 in a limited fashion by establishing control requirements for new and existing sources in some number of existing source categories, while information is developed on other source categories. Actions under other portions of the CAA may involve longer lead times to develop and implement, so that standards under section 111 for certain source categories could provide for emission reductions in the interim. We have begun to examine source categories subject to existing NSPS and other standards to consider how we might determine priorities among them for review and revisions, and whether GHGs could be addressed for specific sectors in a more coordinated, multi-pollutant fashion. EPA requests comment on the availability of its legal authority, if any, to prioritize among source categories in the event that regulation under section 111 was pursued.

Under a ''prioritization'' approach, EPA could seek to revise standards earliest for those categories offering the greatest potential for significant reductions in the emissions of covered pollutants, and either deferring action or determining that no further action is necessary or appropriate at this time for other categories. This conclusion could be based, for example, on the lack of significant improvements in technology since the last NSPS review or the fact that no new sources are considered to be likely in the foreseeable future.

Another possibility might be to schedule and structure the review and revision of standards for source categories to account for the fact that, in addition to the need to address GHG emissions, they may be subject to multiple standards for different pollutants under several sections of the CAA. Such standards may often be subject currently to different review

[244] We recognize that the Court in *Asarco Inc.* v. *EPA*, 578 F.2d 326 (D.C. Cir. 1978) struck down an NSPS provision that allowed netting. The provision at issue there, however, permitted netting between sources, not within a source. *See Alabama Power* v. *EPA*, 636 F.2d 323, 401–02 (D.C. Cir. 1980).

[245] For instance, a ''super-category'' could be created encompassing all aspects of the production, processing, and consumption of petroleum fuels, or to regulate the production and consumption of fossil fuels for heat and power, addressing all aspects of emissions-producing activity within a sector, including fuel production, consumption, and energy conservation.

timetables resulting from when these standards were last established or revised. In addition, as discussed in section III.D of today's notice, they may have the potential for positive or negative interactions with one another and with opportunities for the control of GHG emissions.

Still another approach might consider the impacts of future reduction opportunities or enacted legislation so that standards under section 111 might focus initially on source categories for which near-term benefits might result largely from efficiency improvements which do not result in ''stranded capital,'' or investment in systems that will be superseded by more effective systems that we determine will be available at some specific future date. Alternatively, standards could focus on those sectors of the economy which will not likely be subject to controls being addressed in enacted legislation.

We request comment on EPA's available legal authority, if any, to defer action with respect to any ''class'' of section 111 source categories or subcategories as well as how and under what circumstances EPA could also consider such approaches to the identification of source categories for standards to address GHGs. Assuming the existence of adequate authority, what, if any, additional criteria should be considered in our priority-setting analysis efforts? In considering such sector- or multi-pollutant-based approaches, we further request comment on the extent to which we could establish new or revised source categories which better accommodate these approaches, or whether we are bound by existing source categories and their definitions.

b. Timetables for Promulgation and Implementation

In our experience, collecting and analyzing information regarding available control technologies, resulting emission reductions, and cost effectiveness can take up to several years for a source category. However, this time period can be shortened to 1½ to 2 years when information is readily available or is presented to the Agency in a form that facilitates efficient consideration. With respect to GHGs, there has been significant effort devoted to identifying and evaluating ways to reduce emissions within sectors such as the electricity generating industry, and we are aware of the potential for GHG reductions through energy efficiency and other means within other industries. However, for many others, technologies for reducing GHG emissions have not yet been identified or evaluated by EPA. EPA requests comment on whether and how the availability of current information should be considered when considering regulation under section 111.

As is the case with traditional pollutants, any new or revised NSPS for new and modified sources of GHGs under section 111(b) would be developed through a notice and comment rulemaking process and would be effective upon promulgation. As noted previously, EPA is also required to review, and if appropriate revise, existing NSPS every 8 years unless the Administrator determines that ''such review is not appropriate in light of readily available information on the efficacy of such standard.'' Standards for pollutants not regulated by the existing NSPS may be added concurrent with the 8-year review, but such additions are not part of that review process.

Any section 111(d) emission guidelines associated with the revised NSPS standards would be promulgated either along with or after the NSPS. States are generally required to submit the required state plans containing the standards of performance applicable to existing sources in their jurisdictions within 9 months of EPA's promulgation of the guidelines.

In the case of existing sources regulated under section 111(d), affected sources are typically provided up to 3 years to comply with any resulting requirements; however, states have flexibility to provide longer or shorter compliance timeframes based on a number of source-specific factors. In addition, where we determine that a technology has been adequately demonstrated to be available for use by some particular future date, we believe it is possible to establish timeframes for compliance that reflect this finding.[246]

No explicit 8-year review requirement exists with regard to section 111(d) standards for existing sources. Nonetheless, it also may be appropriate to require existing source plans to periodically revise their control strategies to reflect changes in available technologies and standards over time, particularly where the existing limitations were based on more limited controls at the time they were established. EPA requests comment on its authority and the advisability of such periodic updating with respect to the possible control of GHG.

The CAA and EPA's regulations implementing section 111(d) permit states to consider a number of factors when determining the level of stringency of controls, but do not establish a bright line test when stricter requirements for existing sources are warranted. Many of these sources may also be subject to requirements for the control of other non-section 111(d) pollutants as part of implementation plans to attain and maintain NAAQS for one or more pollutants, and in some cases, these provisions may result in more stringent coincidental control of section 111(d) pollutants. We request comment on how and when we should evaluate, review, and revise as appropriate any section 111(d) standards that might be established in the future for GHGs.

4. What Are the Key Considerations Regarding Use of This Authority To Regulate GHGs?

a. Key Attributes and Limitations of Section 111

As noted above, section 111 possesses certain flexible attributes that may be useful in tailoring emissions standards to address GHG emissions. Yet, regulation under this section also has important limitations. This section of today's notice briefly summarizes these attributes and limitations. We request comment on how these attributes and limitations relate to the policy design considerations set forth in section III.F.1.

Program scope: Section 111 provides EPA with authority to regulate GHG emissions from stationary source categories, but does not require EPA to regulate GHGs emitted by all source categories or even all listed source categories. EPA has flexibility to identify the source categories for which it is appropriate to establish GHG limits. For example, EPA could decide to set GHG limits for those source categories with the largest GHG emissions and reduction opportunities. EPA could postpone or decline to set GHG limits for source categories for which emissions contributions may be small or for which no effective means of reducing emissions exist, currently or within the reasonably foreseeable future. EPA also could consider traditional air pollutants as well as GHGs in setting its overall priorities for the NSPS program.

Source size: Section 111 does not require regulation of all sources above a certain size. Instead, EPA has discretion to use rational emission thresholds to identify which facilities within a source category are covered by NSPS standards.

Consideration of cost: Section 111 explicitly directs EPA to take ''into account the cost of achieving'' emission

[246] See *Portland Cement Association* v. *EPA*, 486 F.2d 275 (D.C. Cir. 1973).

reductions, as well as other nonair quality, health and environmental impact and energy requirements.'' This gives EPA significant flexibility to determine of appropriate levels of control, and can be an important source of distinctions between requirements for new sources and those for modified or reconstructed sources.

Potential for emissions trading: As EPA has interpreted the NSPS requirements in the past with respect to certain air pollutants, we believe that the NSPS program could use emissions trading, including cap-and-trade programs and rate-based regulations that allow emissions trading, to achieve GHG emission reductions. EPA believes such programs are consistent with the statutory requirements because they satisfy the three substantive components of the section 111(a)(1) definition of ''standard of performance''—(1) a standard for emissions of air pollutants; that (2) reflects that degree of emission limitation available''; and (3) ''constitutes the best system of emission reduction.'' A cap-and-trade program can constitute a ''standard for emissions of air pollutants'' because it is a system created by EPA for control of emissions. The use of emissions budgets does not make the system less of a ''standard'' since the budgets must be met regardless of the methodology used to allocate allowances to specific sources. Further, any such system would be based on our assessment of the overall degree of emission reduction available for the source category and our analysis of the available systems of emission reductions. EPA could select a market-oriented mechanism as the ''standard of performance'' if these analyses (including cost analyses) indicate that the system would ''reflect the degree of emission limitation achievable'' and ''constitute the best system of emission reduction.'' EPA also believes that trading among new and existing sources could be permitted, and could offer, at least in some cases, cost efficiencies.[247] EPA also believes that because of the potential cost savings, it might be possible for the Agency to consider deeper reductions through a cap-and-trade program that allowed trading among sources in various source categories relative to other systems of emission reduction. We request comment on the extent of EPA's available legal authority in this area as well as the attributes such a program must possess to qualify as a standard of performance under section 111.

Potential for declining performance standards: EPA believes that section 111 authority may be used to set both single-phase performance standards based upon current technology and to set two-phased or multi-phased standards with more stringent limits in future years. Future-year limits may permissibly be based on technologies that, at the time of the rulemaking, we find adequately demonstrated to be available for use at some specified future date. Alternatively, it may be possible to establish a goal based on future availability of a technology and to revise the standard to reflect technological advancements at appropriate intervals, such as the 8-year review cycles. We believe these concepts could be applied to standards for new and modified sources, as well as to standards for existing sources under section 111(d). In addition, this concept could be coupled with emissions trading.

We recognize that various legal issues and questions concerning legal authority may be involved in setting standards based on technology only adequately demonstrated for use at a future date. For example, there might be greater uncertainty regarding the cost of technology for such standards than for standards based only on technology that is already commercially demonstrated at the time of promulgation. In the Clean Air Mercury Rule (CAMR), which was vacated by the D.C. Circuit on other grounds, EPA interpreted section 111 to allow a two-phased ''standard of performance'' to reduce mercury emissions from existing sources. The compliance date for the more stringent second phase was 2018. EPA believed that it had greater flexibility to set such a standard for existing sources under section 111(d) because these standards, in contrast to section 111(b) standards for new sources, are not subject to the requirements of section 111(e). Section 111(e) makes unlawful to operate any new source in violation of a standard of performance after its effective date. EPA requests comment on this interpretation. We also request comment on the circumstances under which the requirements of section 111(e) would be satisfied by a standard requiring compliance with the initial requirements of a multi-phase standard. More generally, EPA seeks comment on its legal authority in this matter as well as the legal and factual conditions that must be satisfied to support a multi-phase standard with future-year standards based on technology adequately demonstrated for use by that future date. EPA also seeks comment on how far into the future multi-phase standards could extend and the degree of certainty with which EPA must make its determinations of availability for future use, considering the section 111 standard setting language.

Technology development: Section 111 also contains a waiver provision that can be used to encourage the development of innovative technologies, as described below.

Standards tied to available technology: The fact that section 111 requirements are based upon a demonstration of the availability of control technology could limit the amount of reductions achievable through section 111 regulations to demonstrably feasible and cost-effective levels. If a given level of overall emission reduction is determined to be necessary and that level exceeds what is currently demonstrated to be feasible now or by some future date, then section 111 may not provide adequate authority by itself to achieve needed reductions. Although section 111 provides certain opportunities and incentives for technology development, this feature may make it more difficult to set ''stretch goals'' without other companion mechanisms.

In light of these considerations, we request comment on whether and to what extent section 111 provides an appropriate means for regulating GHG emissions.

b. Additional Considerations

We also request comment on the questions presented below which relate to the manner in which EPA could or should exercise its authority under this section to regulate GHGs.

i. What Regulatory Mechanisms Are Available?

As noted above, NSPS standards and 111(d) emission guidelines most commonly establish numerical emission standards expressed as a performance level. Such rate-based limits, however, are not the only mechanisms that could be used to regulate GHGs.

Efficiency Standards: We believe that most reductions in stationary GHG emissions may occur initially as the result of increased energy efficiency, process efficiency improvements, recovery and beneficial use of process gases, and certain raw material and product changes that could reduce inputs of carbon or other GHG-

[247] In the Clean Air Mercury Rule we concluded that new sources needed to comply with a unit specific control requirement in addition to participating in the trading program. We solicit comment on whether section 111 requires such controls for new sources or if it would be sufficient for them to participate in a trading program or other market based mechanism without this restriction. While not ensuring an equally stringent level of control at each new source, the latter approach would be expected to achieve the same total emissions reductions at a lower overall compliance cost.

generating materials. Such emission reductions may range in the near term (e.g., 5–10 years) from 1 to 10%. Thus, it could be possible to utilize NSPS standards to ensure reductions from efficiency improvements are obtained. For such standards to be effective, they likely would generally need to apply to the entire facility, not just specific equipment at the facility. EPA requests comment on the availability of its legal authority in this area and whether and when it might be appropriate to establish efficiency standards for source categories as a way of reducing GHG emissions.

Plant-wide standards: EPA also believes there may be benefits to developing plant-wide or company-wide standards for GHG emissions. Section 111, however, requires each affected facility to comply with the standard. EPA believes that it could redefine the affected facility for certain categories, for purposes of GHG regulation only, to include an entire plant. EPA also requests comment on whether it would be consistent with the statutory requirements to establish company-wide limits.

Work practice standards: In some circumstances, it may not be possible to identify a specific performance level for sources in a particular category; however, section 111(h) permits promulgation of design, equipment, work practice, or operational standards but allows such standards to be established only in specific circumstances. Specifically, it provides that where we determine ''that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations,'' we may establish a ''design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous mission reduction which . . . has been adequately demonstrated.'' EPA requests comment on the circumstances under which the section 111(h) criteria would be satisfied and when, and for which source categories, work practice standards could be appropriate standards to control GHGs.

Market-oriented regulatory mechanisms: As mentioned above, EPA believes that market-oriented regulatory approaches including emissions trading are worthy of consideration for applying NSPS to GHG emissions. Several market-oriented regulatory mechanisms are discussed in section VII.G of today's notice. EPA requests comment on which of these mechanisms are consistent with the section 111 definition of a ''standard of performance.''

ii. Request for Comment on Section 111 Regulatory Approaches

This notice and the Stationary Source TSD describe possible approaches for using section 111 to reduce GHG emissions, in general and in regard to particular source categories. We request comment on the following specific questions regarding potential regulatory approaches under section 111:

- What are the overall advantages and disadvantages of the regulatory approaches discussed above, in light of the policy design considerations in section III.F.1? Please describe in detail any approaches not discussed in today's notice that you think we should consider.
- What are the industry-specific advantages and disadvantages of the regulatory approaches discussed above and in the TSD?

In developing section 111 standards for a particular source category (e.g., refineries, cement plants, industrial commercial boilers, electric generating plants, etc.) we are requesting source category-specific comments on the following additional issues:

- What data are available, or would need to be collected, to support the development of performance standards, either by process, subcategory, or for the facility?
- Should the standards be different for new and existing sources, either in terms of the systems for emission reductions on which they should be based and/or on the regulatory structure and implementing mechanisms for such standards?
- To what extent, if any, should the standards be technology-forcing for existing sources?
- Should the standards require additional reductions over time? To what extent would such reductions be consistent with the authority and purpose of section 111, and how should they be designed and carried out to ensure consistency?

iii. What Reductions Could Be Achieved From Efficiency Improvements at Existing Sources?

Recognizing that existing sources do not have as much flexibility in the levels of control that may realistically be achieved at a new source, a section 111(d) standard regulating GHG from existing sources would at this time most likely focus on currently available measures to increase the energy efficiency at the facility, thereby reducing GHG emissions. Examples of typical measures that promote energy efficiency include the use of cleaner fuels and equipment replacement or process improvements which reduce energy consumption. How well a measure, or combination of measures, will reduce GHG emissions at an individual facility will vary. A review of available literature suggests a range of improvements for various industry sectors that may be achievable through energy and process efficiency improvements, and some representative examples are summarized below. This information is illustrative, and does not represent any final technical determination by the agency as to what emission reduction requirements might be appropriate to require from the source categories discussed below.

For example, reductions in emissions of GHG from cement plants would most likely occur from fuel efficiency and electric energy efficiency measures as well as raw material and product changes that reduce the amount of CO_2 generated per ton of cement produced. There are numerous efficiency measures generally accepted by much of the U.S. industry, and many of these measures have been adopted in recent cement plant improvements. Such measures may directly reduce GHG emissions by cement plants, or they may indirectly reduce GHG emissions at sources of power generation due to reduced electrical energy requirements. The range of effectiveness of the individual measures in reducing GHG is from less than 1% to 10%.[248] Benchmarking and other studies have demonstrated a technical potential for up to 40% improvement in energy efficiency for a new cement plant using the most efficient technologies compared to older plants using wet kilns.

A number of opportunities may exist within refineries to increase energy efficiency by optimizing utilities, fired heaters, heat exchangers, motors, and process designs. Competitive benchmarking data indicate that most petroleum refineries can economically improve energy efficiency by 10 to 20%.[249] Therefore, we would expect that a new refinery could be designed to be at least 20% more efficient than an existing one.

[248] U.S. EPA (2008), Air Pollution Controls and Efficiency Improvement Measures for Cement Kiln. Final Report.

[249] Energy Efficiency Improvement and Cost Saving Opportunities for Petroleum Refineries, LBNL, 2005.

In the case of industrial boilers, measures applied to individual facilities could result in energy savings and GHG reductions on the order of 1% to 10%. Replacing an existing boiler with a combined heat and power plant could improve the energy efficiently of an existing plant by 10% to 33%.

Existing coal-fired power plants can reduce their fuel consumption (reduce heat rate) and reduce CO_2 emissions by performing well known modifications and upgrades to plant systems. Heat rate reductions of up to 10% may be feasible through various efficiency improvements at individual coal units, depending on site specific conditions. Because of plant age and other physical limitations, the potential average heat rate reduction for the coal fleet would likely not exceed about 5%. The existing fleet operates at an average net efficiency of about 33%. If the corresponding coal fleet average net heat rate were reduced by 5% via efficiency improvements, a potential 5% reduction in CO_2 emissions could be obtained as well.

As older, less efficient coal power plants are retired, their capacity may be replaced with new, more efficient coal-fired units. A new, fully proven supercritical coal plant design can operate at a heat rate 10–15% below the current coal fleet average, and therefore produce 10–15% less GHG than the average existing coal plant. Future more advanced ultra-supercritical plant designs with efficiencies above 40% would have heat rates that are 20–25% or more below the current coal fleet average, and therefore produce that much less GHG than the average existing coal plant.

Technology to capture and geologically sequester CO_2 is the subject of ongoing projects in the U.S. and other countries and is a promising technology.[250] The electric power sector will most likely be the largest potential market for carbon capture and sequestration (CCS) technologies, with the potential to reduce CO_2 by approximately 80–90% at an individual plant.[251] It may become possible to apply CCS to some portion of the existing coal-fired fleet by retrofit to achieve significant CO_2 reductions. Other facilities that might be able to use CCS include refineries, chemical manufacturing plants, ethanol production facilities, cement kilns and steel mills. As advances in GHG reduction technologies continue, section 111(d) standards would be expected to consider and reflect those advances over time. We solicit comment on the criteria EPA should use to evaluate whether CCS technology is adequately demonstrated to be available for the electric power and other industrial sectors, including the key milestones and timelines associated with the wide-spread use of the technology.

iv. What Are the Possible Effects of Section 111 With Respect to Innovation?

As noted previously, whatever path may be pursued with respect to the control of GHG through the CAA or other authority, we believe it is likely that most early reductions in stationary GHG emissions may occur as the result of increased energy efficiency, process efficiency improvements, recovery and beneficial use of process gases, and certain raw material and product changes that could reduce inputs of carbon or other GHG-generating materials. Clearly, more fundamental technological changes will be needed to achieve deeper reductions in stationary source GHG emissions over time. We request general comments on how to create an environment in which new, more innovative approaches may be encouraged pursuant to section 111, or other CAA or non-CAA authority.

Waiver authority under section 111(j) would be useful as one element of broader policies to encourage development of innovative technologies. Section 111(j) authorizes the Administrator to waive the NSPS requirements applicable to a source if he determines that the innovative technology the source proposes to use will operate effectively and is likely to achieve greater emission reductions, or at least equivalent reductions but at lower cost. Also, the Administrator must determine that the proposed system has not yet been adequately demonstrated (i.e. it is still an innovative technology), but that it will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction. These waivers can be given for up to 7 years, or 4 years from the date that a source commences operation, whichever is earlier.

We believe that effective GHG reduction techniques for many source categories potentially subject to NSPS may at this time be limited and that additional research and development will be necessary before these controls are demonstrated to be effective. We ask for comment on how the use of innovative technology waivers could conceivably be used to foster the development of additional approaches for GHG reductions.

5. Possible Implications for Other CAA Provisions

Regulation of GHGs under a section 111 standard for any industry would trigger preconstruction permitting requirements for all types of GHG sources under the PSD program. NSPS are also incorporated into operating permits issued under Title V of the CAA. The consequences of triggering and the options for addressing these permitting requirements are addressed in detail in section VII.D of this notice.

Whether GHGs were regulated individually or as a group in NSPS standards would affect the definition of regulated pollutant for stationary sources subject to preconstruction permitting under the PSD program. Conversely, while the section 111 mechanisms are relatively independent of other CAA programs, NSPS decision-making as a practical matter would need to consider the pollutant definitions adopted under other CAA authorities. It would be advantageous to maintain consistency regarding the GHG pollutants subject to regulation elsewhere in the Act to avoid the potential for PSD review requirements for individual GHGs as well as for groups of the same GHGs.

In considering the impact that decisions to list pollutants under other authorities of the CAA might have on our use of section 111 authority, we note that some industries have processes that emit more than one GHG and a potential may exist among some of these industries to control emissions of one GHG in ways that may increase emissions of others (e.g., collecting methane emissions and combusting them to produce heat and/or energy, resulting in emissions of CO_2.) While an overall reduction in GHGs may occur, as well as a reduction in global warming potential, whether GHGs are regulated as a class of compounds or as individual constituents could have implications for the degree of flexibility and for the outcome of any regulatory decisions. More specifically, if we were to regulate GHGs as a group, then standards under section 111 might establish an overall level of performance that could accommodate increases in emissions of some gases together with reductions in others, so long as the overall performance target was met. If we were to regulate individual GHGs, then we may be less able to establish less stringent requirements for the control of some gases, while setting more stringent requirements for others. The extent to which we may be able to do so depends

[250] See *http://www.netl.doe.gov/technologies/carbon_seq/partnerships/partnerships.html* for more information about the Regional Carbon Sequestration Partnerships in the United States.

[251] IPCC Special Report on Carbon Dixoide Capture and Storage, 2005, pp.3, 22.

on the significance of the emissions of each gas from the source category in question as well as the feasibility and cost-effectiveness of controlling each. One result of this lessened flexibility may be the preclusion of certain approaches that could yield greater net reduction in GHG emissions. For this reason, we request comments on (1) the extent to which we are limited in our flexibility to regulate GHG as a class if listed individually under other CAA authorities, and (2) whether regulation under section 111 should treat GHG emissions as a class for determining the appropriate systems for emissions reduction and resulting standards.

Finally, we note that our authority to promulgate 111(d) standards for existing sources depends on the two restrictions noted above. First, section 111(d) prohibits regulation of a NAAQS pollutant under that section. Second, ''where a source category is being regulated under section 112, a section 111(d) standard of performance cannot be established to address any HAP listed under 112(b) that may be emitted from that particular source category.'' If we were to promulgate a section 111(d) emission standard and then subsequently take action under sections 108 or 112 such that we could not promulgate a section 111(d) standard had we not already done so, the continued validity of the section 111(d) regulations might become unclear. We request comment on the extent, if any, to which the requirements of section 111(d) plans would, or could, remain in force under such circumstances.

C. National Emission Standards for Hazardous Air Pollutants

Along with the NAAQS system and section 111 standards, section 112 is one of the three main regulatory pathways under the CAA for stationary sources. Section 112 is the portion of the Act that Congress designed for controlling hazardous air pollutant emissions from these sources, including toxic pollutants with localized or more geographically widespread effects. This focus is reflected in the statutory provisions, which, for example, require EPA to regulate sources with relatively small amounts of emissions. In comparison to section 111, section 112 provides substantially less discretion to EPA concerning the size and types of sources to regulate, and is specific about when EPA may and may not consider cost.

This section explores the implications if EPA were to list GHGs as hazardous air pollutants under section 112.

1. What Does Section 112 Require?

a. Overview

Section 112 contains a list of hazardous air pollutants (HAPs) for regulation. EPA can add or delete pollutants from the list consistent with certain criteria described below.

EPA must list for regulation all categories of major sources that emit one or more of the HAPs listed in the statute or added to the list by EPA. A major source is defined as a source that emits or has the potential to emit 10 tons per year or more of any one HAP or 25 tons per year of any combination of HAPs.

For each major source category, EPA must develop national emission standards for hazardous air pollutants (NESHAP). Standards are required for existing and new major sources. The statute requires the standards to reflect ''the maximum degree of reduction in HAP emissions that is achievable, taking into consideration the cost of achieving the emission reduction, any nonair quality health and environmental impacts, and energy requirements.'' This level of control is commonly referred to as maximum achievable control technology, or MACT.

The statute also provides authority for EPA to list and regulate smaller ''area'' sources of HAPs. For those sources EPA can establish either MACT or less stringent ''generally available control technologies or management practices''.

Section 112(d)(6), requires a review of these technology-based standards every 8 years and requires that they be revised ''as necessary taking into account developments in practices, processes and control technologies.'' Additionally, EPA under section 112(f)(2)(C) must reevaluate MACT standards within 8 years of their issuance to determine whether MACT is sufficient to protect public health with an ample margin of safety and prevent adverse environmental effects. If not, EPA must promulgate more stringent regulations to address any such ''residual risk''.

b. How Are Pollutants and Source Categories Listed for Regulation Under Section 112?

Section 112(b)(1) includes an initial list of more than 180 HAPs. Section 112(b)(2) requires EPA to periodically review the initial HAP list and outlines criteria to be applied in deciding whether to add or delete particular pollutants.

A pollutant may be added to the list because of either human health effects or adverse environmental effects. With regard to adverse human health effects, the provision allows listing of pollutants ''including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic.'' An adverse environmental effect is defined as ''any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.'' Section 112(b)(2) provides that ''no substance, practice, process or activity regulated under [the Clean Air Act's stratospheric ozone protection program] shall be subject to regulation under this section solely due to its adverse effects on the environment.'' Thus, section 112 may not be used to regulate certain chlorofluorocarbons and other ozone-depleting substances, their sources, or activities related to their production and use to address climate change unless we establish that such regulations are necessary to address human health effects in addition to any adverse environmental impacts. See section 602 of the Clean Air Act for a partial list of these substances.

Section 112(b)(3) of the Act establishes general requirements for petitioning EPA to modify the HAP list by adding or deleting a substance. Although the Administrator may add or delete a substance on his own initiative, if a party petitions the Agency to add or delete a substance, the burden historically has been on the petitioner to include sufficient information to support the requested addition or deletion under the substantive criteria set forth in CAA section 112(b)(3)(B) and (C). The Administrator must either grant or deny a petition within 18 months of receipt of a complete petition.

The effects and findings described in section 112 are different from other sections of the CAA addressing endangerment of public health discussed in previous sections of today's notice. Given the nature of the effects identified in section 112(b)(2), we request comment on whether the health and environmental effects attributable to GHG fall within the scope of this section. We also request comment on direct and indirect GHG emissions from existing source categories currently subject to regulation under section 112, any assessment of the relative costs of regulating GHG under the authority of section 112, and any co-benefits or co-detriments with regard to controlling GHG and the emissions of HAP.

The source categories to be regulated under section 112 are determined based on the list of HAP. Section 112(c) requires EPA to publish a list of all categories and subcategories of major sources of one or more of the listed pollutants, and to periodically review and update that list. In doing this, EPA also is required to list each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under section 112.

c. How Is MACT Determined?

In essence, MACT standards are intended to ensure that all major sources of HAP emissions achieve the level of control already being achieved by the better controlled and lower emitting sources in each category. This approach provides assurance to citizens that each major source of toxic air pollution will be required to effectively control its emissions. At the same time, this approach provides assurances that facilities that employ cleaner processes and good emissions controls are not disadvantaged relative to competitors with poorer controls.

MACT is determined separately for new and existing sources. For existing sources, MACT standards must be at least as stringent as the average emissions limitation achieved by the best performing 12 percent of sources in the category or subcategory (or the best performing five sources for source categories with less than 30 sources). This level is called the ''MACT floor.'' For new or reconstructed sources, MACT standards must be at least as stringent as the control level achieved in practice by the best controlled similar source.[252] EPA also must consider more stringent ''beyond-the-floor'' control options for MACT. When considering beyond-the-floor options, EPA must consider not only the maximum degree of reduction in emissions of the HAP, but also costs, energy requirements and non-air quality health environmental impacts of imposing such requirements.

MACT standards may require the application of measures, processes, methods, systems, or techniques including, but not limited to, (1) reducing the volume of, or eliminating emissions of, such pollutants through process changes, substitution of materials, or other modifications; (2) enclosing systems or processes to eliminate emissions; (3) collecting, capturing, or treating such pollutants when released from a process, stack, storage or fugitive emissions point; (4) design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h); or (5) a combination of the above. (See section 112(d)(2) of the Act.)

For area sources, CAA section 112(d)(5) provides that the standards may reflect generally available control technology or management practices (GACT) in lieu of MACT.

d. What Is Required To Address Any Residual Risk?

Section 112(f)(2) of the CAA requires us to determine for each section 112(d) source category whether the MACT standards protect public health with an ample margin of safety. If the MACT standards for a HAP ''classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than 1-in-1-million,'' EPA must promulgate residual risk standards for the source category (or subcategory) as necessary to protect public health with an ample margin of safety. EPA must also adopt more stringent standards if needed to prevent an adverse environmental effect, but must consider cost, energy, safety, and other relevant factors in doing so. EPA solicits comments on the extent to which these programs could apply with respect to the possible regulation of sources of GHG under section 112, including the relevance of any carcinogenic effects of individual GHG.

2. What Sources Would Be Affected if GHGs Were Regulated Under This Authority?

If GHGs were listed as HAP, EPA would be required to regulate a very large number of new and existing stationary sources, including smaller sources than if alternative CAA authorities were used to regulate GHG. This is the result of three key requirements. First, the section 112(a) major sources thresholds of 10 tons for a single HAP and 25 for any combination of HAPs would mean that very small GHG emitters would be considered major sources. Second, section 112(c) requires EPA to list all categories of major sources. Third, section 112(d) requires EPA to issue MACT standards for all listed categories.

We believe that most significant stationary source categories of GHG emissions have already been listed under section 112 (although the 10-ton threshold in the case of GHGs would be expected to bring in additional categories such as furnaces in buildings, as explained below). To date we have adopted standards for over 170 categories and subcategories of major and area sources. This is a significantly greater number than the categories for which we have adopted NSPS because under section 112 we must establish standards for *all* listed categories, whereas section 111 requires that we identify and regulate only those source categories that contribute ''significantly'' to air pollution endangering public health and welfare.

3. What Are the Key Milestones and Expected Timeline if Section 112 Were Used for GHG Controls?

One possible timetable for addressing GHG under this part of the Act would be to incorporate GHG emission control requirements concurrent with the mandatory 8-year technology reviews for each category, collecting information on emissions and control technologies at the time the existing MACT standards are reviewed to determine whether revisions are needed. If we were to list new source categories under section 112, EPA would be required to adopt MACT standards for those categories within 2 years of the date of category listing.

EPA must require existing sources to comply within 3 years of a standard's promulgation, although states and EPA are authorized in certain circumstances to extend the period of compliance by one additional year. Most new sources must comply as soon as a section 112 standard is issued; however, there is an exception where the final rule is more stringent than the proposal.

Because of the more detailed requirements for identifying appropriate levels of control to establish a level for MACT, significantly more information on the best performing sources is needed under section 112 than under section 111, making the development of such standards within 2 years after listing a source category difficult. We request comment on this and other approaches for addressing GHG under section 112, both for categories already listed for regulation and for any that might appropriately be added to the section 112 source category list if we were to elect to regulate GHGs under this section.

4. What Are the Key Considerations Regarding Use of This Authority for GHGs (and How Could Potential Issues Be Addressed)?

A key consideration in evaluating use of section 112 for GHG regulation is that

[252] See CAA section 112(d)(3).

the statutory provisions appear to allow EPA little flexibility regarding either the source categories to be regulated or the size of sources to regulate. As described above, EPA would be required to regulate a very large number of new and existing stationary sources, including smaller sources than if alternative CAA authorities were used to regulate GHG. For example, in calculating CO2 emissions based on fossil-fuel consumption, we believe that small commercial or institutional establishments and facilities with natural gas-fired furnaces would exceed this major source threshold; indeed, a large single-family residence could exceed this threshold if all appliances consumed natural gas. EPA requests comment on the requirement to establish standards for all sources under section 112 relevant to GHG emissions and whether any statutory flexibility is or is not available with respect to this requirement and GHGs.

A section 112 approach for GHGs would require EPA to issue a large number of standards based on assessments for each source category. Determining MACT based on the best-controlled 12 percent of similar sources for each category would present a difficult challenge, owing to our current lack of information about GHG control by such sources and the effort required to obtain sufficient information to establish a permissible level of performance.

GHG regulation under section 112 would likely be less cost effective than under some CAA authorities, in part because section 112 was designed to ensure a MACT level of control by each major source, and thus provides little flexibility for market-oriented approaches. Given the structure and past implementation of section 112, this section may not provide EPA with authority to allow emissions trading among facilities or averaging across emitting equipment in different source categories. This is because the statutory terms of section 112 provide that emission standards must be established for sources within ''each category'' and those standards must be no less stringent than the ''floor,'' or the level of performance achieved by the best-performing sources within that category. Each source in the category must then achieve control at least to this floor level. Trading would allow sources to emit above the floor. In addition, it may not be possible to assess individual source fence line risk for section 112(f) residual risk purposes if the sources did not each have fixed limits. Finally, the section 112 program is in part designed to protect the population in the vicinity of each facility, which trading could undermine (in contrast to an ambient standard). Given the global nature of GHGs and the lack of direct health effects from such emissions at ambient levels, EPA requests comments on the extent to which the CAA could be interpreted to grant flexibility to consider such alternative implementation mechanisms, and what, if any, limitations should be considered appropriate in conjunction with them.

Another reason that section 112 regulation of GHGs would be expected to be less cost effective than other approaches is that the statute limits consideration of cost in setting MACT standards. As described above, the statute sets minimum stringency levels, or ''floors,'' for new and existing source standards. Cost can only be considered in determining whether to require standards to be more stringent than the floor level.

A further consideration is that the short compliance timetables—immediate for most new sources, and within 3–4 years for existing sources—appear to preclude setting longer compliance timeframes to allow for emerging GHG technologies to be further developed or commercialized.

5. What Are the Possible Implications for Other Provisions of the Clean Air Act?

As provided under section 112(b)(6), pollutants regulated under section 112 of the Act are exempt from regulation under the PSD program. Also, a section 111(d) standard of performance for existing sources cannot be established to address any HAP listed under section 112(b) that that is emitted from a source category regulated under section 112.[253]

If EPA were to list GHGs under section 108 of the CAA for purposes of establishing NAAQS, we would be prevented by section 112(b)(2) from listing and regulating them as HAPs under this section of the Act. However, it is less clear that the reverse is true; that is, if a pollutant were first listed under section 112 and then EPA decided to list and regulate it under section 108, the statute does not clearly say whether that is permissible, or whether EPA would then have to remove the pollutant from the section 112 pollutant list. We request comment on the extent to which this apparent ambiguity in the Act poses an issue regarding possible avenues for regulating GHG and if so, how it should be addressed.

[253] It is important to note that many sources may be subject to standards under both section 111 and 112; however these standards establish requirements for the control of different pollutants.

In light of the foregoing, we request comment on the appropriateness of section 112 as a mechanism for regulating stationary source emissions of GHGs under the CAA. If commenters believe use of section 112 would be appropriate, we further request comments on which GHGs should be considered, what additional sources of emissions should be listed and regulated, and how MACT should be determined for GHG emission sources.

D. Solid Waste Combustion Standards

1. What Does Section 129 Require?

Section 129 of the CAA requires EPA to set performance standards under section 111 to control emissions from solid waste incineration units of at least 9 specific air pollutants. It directs EPA to develop standards which include emission limitations and other requirements for new units and guidelines and other requirements applicable to existing units.

Section 129 directs EPA to set standards for ''each category'' of such units, including those that combust municipal, hospital, medical, infectious, commercial, or industrial waste, and ''other categories'' of solid waste incineration units, irrespective of size. The pollutants to be addressed by these standards include the NAAQS pollutants particulate matter (total and fine), sulfur dioxide, oxides of nitrogen, carbon monoxide, and lead; and the hazardous air pollutants hydrogen chloride, cadmium, mercury, and dioxins and dibenzofurans. EPA is authorized to regulate additional pollutants under these provisions, but section 129 includes no endangerment test or other criteria for determining when it is appropriate to do so.

Although the emission standards called for by section 129 are to be established pursuant to section 111, the degree of control required under those standards more closely resembles that of section 112(d). For new sources the level of control is required to be no less stringent than that of the best performing similar source, while for existing sources the level of control is to be no less stringent than the average of the top 12% of best-performing sources. For both new and existing source standards, beyond these ''floor'' levels EPA must consider the cost of achieving resulting emission reductions and any non-air quality health and environmental impacts and energy requirements in determining what is achievable for units within each category. The performance standards must be reviewed every 5 years. Additionally, for those pollutants that are listed under section 112 as a HAP, EPA must reevaluate the standards in accordance with section 112(f) to determine whether they are sufficient to protect public health with an ample margin of safety and prevent adverse environmental effects, and must promulgate more stringent regulations if necessary to address any such ''residual risk.'' Thus, for this particular class of source categories, section 129 merges important elements of both sections 111 and 112.

EPA has established standards for a variety of solid waste incinerator categories and is in the process of developing additional standards and revising others.[254] In the absence of statutory criteria for determining whether and under what circumstances EPA should regulate additional pollutants under this section of the CAA, we request comment on whether emissions of GHG could fall within the scope of this section. We also request comment on direct and indirect GHG emissions from existing source categories currently subject to regulation under section 129, any assessment of the relative costs of regulating GHGs under the authority of section 129, and any co-benefits or co-detriments with regard to controlling GHG and the emissions of pollutants specifically listed for regulation under section 129.

2. What Sources Would Be Affected if GHGs Were Regulated Under This Authority?

Standards required by section 129 are applicable to ''any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels).'' Thus the provisions of this section are limited to a specific type of emission source, although there are many such units in existence that are subject to regulation. To date we have adopted standards for five categories of incinerators and are currently in the process of developing revised standards on remand for several of these categories, which may involve the inclusion of several additional subcategories of incineration units. We anticipate that when completed these rules will establish standards of performance for as many as five hundred or more units.

[254] Rules have been promulgated for large and small municipal waste combustors; medical waste incinerators; other solid waste incinerators; and commercial, institutional, and industrial solid waste incinerators. EPA is also currently reevaluating and revising certain standards under section 129 in response to decisions by the U.S. Court of Appeals for the D.C. Circuit.

Because section 129 does not require, but authorizes EPA to establish requirements for other air pollutants, we request comment on whether and for what categories or subcategories of incinerators EPA could address GHG emissions control requirements.

a. How Are Control Requirements Determined?

As noted above, the control requirements for sources regulated under section 129 are similar to the MACT standards mandated under section 112(d). However, whereas section 112(d)(3) provides that standards are to be based on the best performing sources ''for which the Administrator has emissions information,'' section 129 contains no such limitation. Consequently, it appears that EPA is obligated to obtain information from all potentially affected sources in order to determine the appropriate level of control.

Section 129(a)(2) provides authority for EPA to distinguish among classes, types, and sizes of units within a category in establishing standards. This provision is similar to authorities provided in sections 111(b)(2) and 112(b)(2). Because section 129 directs that EPA establish standards for affected source categories under sections 111(b) and (d), we believe that the provisions governing the creation of design, equipment, work practice, or operational standards are also available for standards required by section 129. For existing sources, we believe that provisions for consideration of remaining useful life and other related factors are relevant to EPA and States when determining the requirements and schedules for compliance for individual affected sources.

b. What Is Required To Address Any Residual Risk?

For each of the air pollutants named in section 129 that are listed as HAP under section 112, section 129 requires EPA to evaluate and address any residual risk remaining after controls established under the initial emission standards.[255] In so doing, it requires EPA to determine for each affected source category whether the performance standards protect public health with an ample margin of safety. EPA must also adopt more stringent standards if needed to prevent an adverse environmental effect, but must consider cost, energy, safety, and other relevant factors in doing so.

[255] Section 129(h)(3) provides that for purposes of considering residual risk the standards under section 129(a) and section 111 applicable to categories of solid waste incineration units are to be ''deemed standards under section 112(d)(2).''

Section 129(h)(3) limits residual risk assessments and any subsequent resulting regulations to ''the pollutants listed under subsection (a)(4) of this section and no others.'' Consequently, if EPA were to regulated GHG emissions from incineration units under section 129, we would not be required to conduct additional residual risk determinations.

3. What Are the Key Milestones and Expected Timeline if Section 129 Were Used for GHG Controls?

As stated above, we have adopted rules governing emissions from certain categories of solid waste incineration units and are in the process of revising or establishing new standards for others. Thus if we were to elect to regulate GHG emissions under section 129, a question arises concerning how to incorporate new requirements for those categories for which standards have already been established. One possible timetable for addressing GHG under this part of the Act would be to incorporate GHG emission control requirements concurrent with the mandatory 5-year reviews for each previously-regulated category, collecting information on emissions and control technologies at the time the existing standards are reviewed to determine whether revisions are needed. Because of the more detailed requirements for identifying appropriate levels of control to establish a level for these categories of sources, significantly more information on the best performing sources is needed under section 129 than even under section 112 (because of the absence of limitations for this analysis to those sources ''for which the Administrator has information''), making the development of such standards a more time-consuming effort. In the event that we were to elect to regulate GHGd under this section, we request comment on this and other approaches for addressing GHGd under section 129, both for categories already regulated and for any for which standards are currently under development.

4. What Are the Key Considerations Regarding Use of This Authority for GHGs (and How Could Potential Issues Be Addressed)?

If we were to elect to regulate GHG emissions from solid waste incinerators under section 129, then we would need to establish standards for at least some number of categories of such sources. We request comment on the availability of authority to establish requirements for controlling GHG emissions from subcategories of incineration units based on size, type or class, as provided under section 111, and to exclude from regulation other categories or subcategories.

Given the structure of section 129 and its hybrid approach to the use of authorities under sections 111 and 112, we question whether this section provides EPA with available authority to establish alternative compliance approaches, such as emissions trading or averaging across sources within a category. This is because the statutory terms of section 129 provide that emission standards must be established for sources within ''each category'' and those standards must be no less stringent than the level of performance achieved by the best-performing sources within that category. Each source in the category must then achieve control at least to this level. Trading would allow sources to emit above the floor. As a practical matter, given that requirements for control of specifically-listed pollutants may preclude trading for those pollutants, and given that many of the controls applicable to those pollutants would be the same as or similar to those that would be applicable to GHGs, we believe that trading options would likely be infeasible with respect to GHG control requirements. However, EPA requests comments on the extent to which the CAA could be interpreted to grant flexibility to consider such alternative implementation mechanisms, to what extent, and what, if any, limitations should be considered appropriate in conjunction with them.

5. What Are the Possible Implications for Other Provisions of the Clean Air Act?

Section 129 recognizes that many incineration units may also be subject to prevention of significant deterioration or nonattainment new source review requirements. It addresses potentially conflicting outcomes of control determinations under those programs by providing that ''no requirement of an applicable implementation plan . . . may be used to weaken the standards in effect under this section.''

If EPA were to list GHGs under section 108 for purposes of establishing NAAQS, we would not be prevented from regulating them under this section of the Act as well. If EPA were to list GHG under section 112, a potential conflict arises in that section 112 establishes major and area source emissions thresholds, providing for standards of different stringency for each, and requires analysis of residual risk for major sources regulated under that section of the Act. We request comments on how such apparent conflicts could be reconciled if we were to elect to regulate emissions of GHGs from solid waste incineration units under section 129.

In light of the foregoing, we request comment on the appropriateness of section 129 as a mechanism for regulating incineration unit emissions of GHGs under the CAA. If commenters believe that use of section 129 would be appropriate, we further request comments on which GHGs should be considered, what source categories or subcategories should be regulated, and how appropriate control requirements should be determined for new and existing GHG emission sources.

E. Preconstruction Permits Under the New Source Review (NSR) Program

1. What Are the Clean Air Act Provisions Describing the NSR Program?

Under what is known as the New Source Review (NSR) program, the CAA requires the owners and operators of large stationary sources of air pollution to obtain construction permits prior to building or modifying such a facility. The program is subdivided into the Prevention of Significant Deterioration (PSD) and nonattainment NSR (NNSR) programs, either of which may be applicable depending on the air quality for a particular pollutant in the location of the source subject to permitting.

The PSD program, set forth in Part C of Title I of the CAA, applies in areas that are in attainment with the NAAQS (or are unclassifiable) and has the following five goals and purposes:

• To protect public health and welfare from air pollution beyond that which is addressed by the attainment and maintenance of NAAQS;

• To protect specially designated areas such as national parks and wilderness areas from the effects of air pollution;

• To assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

• To assure emissions in one state will not interfere with another state's PSD plan; and

• To assure that any decision to permit increased air pollution is made only after evaluating the consequences of the decision and after opportunities for informed public participation.

The main element of the PSD program is the requirement that a PSD permit be obtained prior to construction of any new ''major emitting facility'' or any new ''major modification.'' Before a source can receive approval to construct under PSD, the source and its permitting authority (usually a state or local air pollution control agency, but sometimes EPA) must follow certain procedural steps, and the permit must contain certain substantive requirements. The most important procedural step is providing an opportunity for the public to comment when a permitting authority proposes to issue a permit.

The PSD program primarily applies to all pollutants for which a NAAQS is promulgated, but some of the substantive requirements of the PSD program also apply to regulated pollutants for which there is no NAAQS (except that there is an explicit statutory exemption from PSD for HAPs).[256] Since there is currently no NAAQS for GHGs and GHGs are not otherwise subject to regulation under the CAA, the PSD program is not currently applicable to GHGs.[257] However, as discussed in section IV of this notice, it is possible that EPA actions under other parts of the CAA could make GHGs pollutants subject to regulation under the Act and thus subject to one or more parts of the PSD program.

If EPA were to promulgate a rule establishing limitations on GHG emissions from mobile sources or stationary sources without promulgating a NAAQS for GHGs, the PSD requirement of greatest relevance would be the requirement that a permit contain emissions limits that reflect the Best Available Control Technology (BACT). BACT is defined as the maximum achievable degree of emissions reduction for a given pollutant (determined by the permitting authority on a case-by-case basis), taking into account energy, environmental, and economic impacts. BACT may include add-on controls, but also includes application of inherently lower-polluting production processes and other available methods and techniques for control. BACT cannot be less stringent than any applicable NSPS.

Since emission control requirements will likely have the most direct impact on new or modified stationary sources subject to PSD, our focus in this notice is on the BACT requirement. However, we are also interested in stakeholder input on the extent to which we should

[256] CAA section 112(b)(6).

[257] In the Energy Independence and Security Act of 2007 (EISA), Congress provided that regulation of GHGs under CAA section 211(o) would not automatically result in regulation of GHGs under other CAA provisions. Because of this provision, EISA does not impact the interrelationship of other provisions of the CAA, and we only reference the HAP exception in the text.

evaluate other substantive PSD program elements which would be affected by any possible EPA action to regulate GHGs under other parts of the Act. These include the requirements to evaluate, in consultation with the appropriate Federal Land Manager (FLM), the potential impact of proposed construction on the Air Quality Related Values of any affected ''Class I area'' (national parks, wilderness areas, etc.) and additional impacts analysis.[258]

If EPA were to promulgate a NAAQS for GHGs, because of the relatively uniform concentration of GHGs, we expect that the entire country would be in nonattainment or attainment of the NAAQS. The preconstruction permitting requirements that apply would depend on whether the country is designated as nonattainment or attainment for the GHG emissions that would increase as a result of a project being constructed.

If the entire country is designated attainment, and PSD applies, the adoption of a NAAQS would trigger air quality analysis requirements that are in addition to all the requirements described above. For example, under CAA section 165(a)(3), permit applicants have to conduct modeling to determine whether they cause or contribute to a NAAQS violation. Following promulgation of a NAAQS, EPA may also promulgate a PSD increment for GHGs, which would require additional analysis for each new and modified source subject to PSD.[259] However, this notice does not address in detail the PSD elements that relate to increments.

Under a GHG NAAQS with the country in nonattainment, the nonattainment NSR permitting program would be triggered nationally. The nonattainment NSR program requirements are contained in section 173 of the Act. Like PSD, they apply to new and modified major stationary sources, but they contain significantly different requirements from the PSD program. A key difference is the requirement that the emissions increases from the new or modified source in a nonattainment area must be offset by reductions in existing emissions from the same nonattainment area or a contributing upwind nonattainment area of equal or higher nonattainment classification. The offsetting emissions reductions must be at least equal to the proposed increase and must be consistent with a SIP that assures the nonattainment area is making reasonable progress toward attainment.[260] Another key difference is that instead of BACT, sources subject to nonattainment NSR must comply with the Lowest Achievable Emission Rate (LAER), which is the most stringent emission limitation that is (1) contained in any SIP for that type of source, or (2) achieved in practice for sources of the same type as the proposed source.[261] Notably, if the rate is achievable, LAER does not allow for consideration of costs or of the other factors that BACT does. While LAER and offsets are likely of greatest significance for GHG regulation under nonattainment NSR, there are additional requirements for nonattainment NSR that would also apply. The additional requirements include the alternatives analysis requirement; the requirement that source owners and operators demonstrate statewide compliance with the Act; and the prohibition against permit issuance if the SIP is not being adequately implemented.

For simplicity, the remainder of this notice describing affected sources, impacts, and possible tailoring generally focuses on PSD, raising issues specific to nonattainment NSR where applicable.

2. What Sources Would Be Affected if GHGs Were Regulated Under NSR?

A PSD permit is required for the construction or modification of ''major emitting facilities,'' which are commonly referred to as ''major sources.'' A ''major emitting facility'' is generally any source that emits or has the potential to emit 250 tons per year (tpy) of a regulated NSR pollutant.[262] [263] A source that belongs to one of several specifically identified source categories is considered a major source if it emits or has the potential to emit 100 tpy of a regulated NSR pollutant.[264] Also, for nonattainment NSR, the major source threshold is at most 100 tpy, and is less in some nonattainment areas, depending on the pollutant and the nonattainment classification.

A ''major modification'' is any physical change or change in the method of operation of a major source which significantly increases the amount of emissions of any regulated NSR pollutant. EPA defines what emissions levels of a pollutant are ''significant'' through regulation, and the defined significance levels range from 0.3 tpy for lead to 100 tpy for CO. Currently there is no defined significance level for GHGs (either individually or as a group) because they are not regulated NSR pollutants, and thus, were GHGs to become regulated, the significance threshold would be zero. Note that, when determining whether a facility is ''major,'' a source need not count fugitive emissions (i.e., emissions which may not reasonably be vented through stacks, vents, etc.) unless it is in a listed category.

As noted in section IV, GHGs are not currently subject to regulation under the Act, and therefore are not regulated NSR pollutants. However, if GHG emissions become subject to regulation under any of the stationary or mobile source authorities discussed above (except sections 112 and 211(o)), GHGs could become regulated NSR pollutants. Many types of new GHG sources and GHG-increasing modifications that have not heretofore been subject to PSD would become subject to PSD permitting requirements. This is particularly true for CO_2 because, as noted in section III, the mass CO_2 emissions from many source types are orders of magnitude greater than for currently regulated pollutants. Thus, many types of new small fuel-combusting equipment could become newly subject to the PSD program if CO_2 becomes a regulated NSR pollutant. As discussed below in the section on potential to emit, the extent to which such equipment would become subject to PSD would depend upon whether, for each type of equipment, its maximum capacity considering its physical and operational design would involve constant year-round operation or some lesser amount of operation. For example, the calculated size of a natural gas-fired furnace that has a potential to emit 250 tpy of CO_2, if year-round operation (8760 hours per year) were assumed—would be only 0.49 MMBTU/hr, which is comparable to the size of a very small commercial furnace. In practice, a furnace like this would likely operate far less than year round and its actual emissions would be well below 250 tpy. For example, such a furnace, if used for

[258] As codified at 40 CFR 51.166(o), the owner or operator shall provide an analysis of the impairment to visibility, soils, and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial, and other growth associated with the source or modification.

[259] PSD increments are air quality levels which represent an allowable deterioration in air quality as compared to the existing air quality level on a certain baseline date for a given area.

[260] CAA section 173(a)(1); limitations on offsets are set forth in section 173(c).

[261] CAA section 173(a); LAER is defined in section 171(3)(A).

[262] 42 U.S.C. 7569(1). The PSD regulations use the term ''major stationary source.'' 40 CFR 51.166(b)(1) The definition of ''regulated NSR pollutant'' is at 40 CFR 51.166(b)(49).

[263] ''Potential-to-emit'', or PTE, is defined as the maximum capacity of a source to emit any air pollutant under its physical and operational design.

[264] These specific sources include major industrial categories such as petroleum refining, fossil-fuel fired steam electric plants, chemical process plants, and 24 other categories. The full list of 100 tpy major sources is promulgated at 40 CFR 51.166(b)(1)(i)(a).

space heating, might only be burning gas for about 1000 hours per year, meaning that it would need to be sized at over 4 MMBTU/hr—a size more comparable to a small industrial furnace—to actually emit 250 tons of CO_2. For sources such as these, the interpretation of the term ''potential to emit'' and the availability of streamlined mechanisms for smaller sources to limit their potential to emit would determine whether they would be considered ''major'' for GHG emissions under PSD.

For sources already major for other pollutants, it is likely that many more changes made by the source would also qualify as major modifications and become subject to PSD as well, unless potential approaches (including those discussed below) for raising applicability thresholds were implemented. Relatively small changes in energy use that cause criteria pollutant emissions too small to trigger PSD would newly trigger PSD at such facilities because such changes would likely result in greater CO_2 increases. For example, consider a hypothetical 500 MW electric utility boiler firing a bituminous coal that is well-controlled for traditional pollutants. Such a boiler, operating more than 7000 hours per year (out of a possible 8760), can emit approximately 4 million tons of CO_2 per year, or more than 580 tons per hour. Assuming a 100 tpy significance level (rather than the current zero level for GHGs), any change resulting in just 10 additional minutes of utilization over the course of a year at such a source would be enough to result in an increase of 100 tons and potentially subject the change to PSD. By contrast, to be considered a modification for NO_X, the same change would require approximately 36 additional hours of operation assuming that the hypothetical source had a low-NO_X burner, and 90 additional hours of operation assuming that the source also employed a selective catalytic reduction add-on control device.

Once a source is major for any NSR regulated pollutant, PSD applies to significant increases of any other regulated pollutant, so significant increases of GHGs would become newly subject to PSD at sources that are now major for other regulated pollutants. Similarly, significant increases of other pollutants would become subject to PSD if they occur at sources previously considered minor, but which become classified as major sources for GHG emissions.

Currently, EPA estimates that EPA, state, and local permitting authorities issue approximately 200–300 PSD permits nationally each year for construction of new major sources and major modifications at existing major sources. Under existing major source thresholds, we estimate that if CO_2 becomes a regulated NSR pollutant (either as an individual GHG or as a group of GHGs), the number of PSD permits required to be issued each year would increase by more than a factor of 10 (*i.e.* more than 2000–3000 permits per year), unless action were taken to limit the scope of the PSD program under one or more of the legal theories described below. The additional permits would generally be issued to smaller industrial sources, as well as large office and residential buildings, hotels, large retail establishments, and similar facilities. These facilities consist primarily of equipment that combusts fuels of various kinds and release their exhaust gases through a stack or vent. Few of these additional permits would be for source categories (such as agriculture) where emissions are ''fugitive,'' because, as noted above, fugitive emissions do not count toward determining if a source is a major source except in a limited number of categories of large sources.

Because EPA and states have generally not collected emissions information on sources this small, our estimate of the number of additional permits relies on limited available information and engineering judgment, and is uncertain. Our estimate of the number of additional permits is also not comprehensive. First, it does not include permits that would be required for modifications to existing major GHG sources because the number of these is more difficult to estimate.[265] Nonetheless, we anticipate that, for modifications, coverage of GHGs would increase because the larger universe of major sources will bring in additional sources at which modifications could occur and because for ''traditional'' major sources, many more types of small modifications that were minor for traditional pollutants could become major due to increases in GHG emissions that exceed the significance levels. Second, EPA's estimate is uncertain because it is based on actual emissions, and thus excludes a potentially very large number of sources that would be major if they operated at their full potential-to-emit (PTE) (i.e. they emitted at a level that reflects the maximum capacity to emit under their physical and operational design), but which in practice do not. Such sources could be defined as major sources without an enforceable limitation on their PTE, but for the purposes of this estimate, we assume they have options for limiting their PTE and avoiding classification as a major source. (Nonetheless, there are important considerations in creating such PTE limits, as discussed below). Third, this estimate does not specifically account for CO_2 from sources other than combustion sources. While we know there are sources with significant non-combustion emissions of GHGs, there are relatively few of these compared to the sources with major amounts of combustion CO_2. These non-combustion sources would likely be major for combustion CO_2 in any event, and many of these are likely already major for other pollutants, though GHG regulation would likely mean increases in the number of major modifications at such sources.

We request any available information that would allow us to better characterize the number and types of sources and modifications that would become subject to the PSD program if CO_2 becomes a regulated NSR pollutant. As discussed below, we are particularly interested in information that would allow us to analyze the effects of different major source thresholds and significance levels.

Finally, we note that our estimates above are for CO_2. As described above in section IV, there are implications to regulating additional GHGs as pollutants, or GHGs in the aggregate. Our estimates of PSD program impacts do not include consideration of GHGs other than CO_2 because we expect that at the vast majority of these sources CO_2 will be the dominant pollutant. We ask for comment on whether there are large categories of potentially newly regulated PSD sources for individual GHGs besides CO_2. We also ask for comment on the effects of aggregating GHGs for PSD applicability. Aggregating GHGs could bring additional sources into PSD to the extent that other GHGs are present and would add enough to a source's PTE to make it a major source. On the other hand, under the netting provisions of the CAA, it may be easier to facilitate interpollutant netting if GHGs are aggregated (e.g., a source using netting to avoid PSD for a CO_2 increase based on methane decreases at the same source).

[265] Among other things, any estimate of modifications must take into account the netting provisions of NSR, in which sources can avoid NSR if the increase of pollutant emissions from a project is below the significance level for that pollutant, after taking into account other increases and decreases of emissions that are contemporaneous with the project.

3. What Are the Key Milestones and Expected Timeline if the PSD Program Were Used for GHG Controls?

Because PSD applies to all regulated pollutants except HAP, EPA's interpretation of the Act is that PSD program requirements would become applicable immediately upon the effective date of the first regulation requiring GHG control under the Act.[266] While existing PSD permits would remain unaffected, from that point forward, each new major source of GHGs and each major modification at an existing major source that significantly increases GHGs would need to get a PSD permit before beginning construction. Control requirements could take effect as the first new and modified sources obtain their permits and complete construction of the permitted projects. Because of the case-by-case nature of the PSD permitting decisions, the complexity of the PSD permitting requirements, and the time needed to complete the PSD permitting process, it can take several months to receive a simple PSD permit, and more than a year to receive a permit for a complex facility. We ask for comment on whether there are additional timeline considerations not noted here.

4. What Are Key Considerations Regarding Application of the PSD Program to GHGs (and How Could Potential Issues Be Addressed?)

a. Program Scope

As noted above, regulating GHGs under the PSD program has the potential to dramatically expand the number of sources required to obtain PSD permits, unless action is taken to limit the scope of the program, as described below. Since major source thresholds were enacted before this assessment of the application of the PSD program to GHGs, it is reasonable to expect that Congress could consider legislative alterations to account for the different aspects of GHGs versus traditional air pollutants noted above (e.g., the relatively uniform atmospheric concentrations of GHGs versus more localized effects of traditional pollutants.) Possible ways to limit the scope of the program without legislation are described later in this section.

[266] Because PSD is implemented in many areas by states under EPA-approved state regulations, there may be a lag time in a small number of states if their PSD regulations are written in such a way that revision of the regulations (and EPA approval) would be required to give the state authority to issue permits for GHGs. However this would not be the case for EPA's own regulations or for any state delegated to implement EPA regulations on our behalf.

In the absence of such action, we would expect (assuming a 250 tpy major source threshold, or 100 tpy for statutorily specified source categories) at least an order-of-magnitude increase in the number of new sources required to obtain PSD permits, and an expansion of the program to numerous smaller sources not previously subject to it. While such sources may emit amounts of GHGs that exceed statutory thresholds, they have relatively small emissions of non-GHG pollutants (such that they have not been regulated under PSD, and many have not been regulated under any CAA program).[267] Regulating GHGs under the PSD program would also cause a large increase in the number of modifications at existing sources that would be required to obtain PSD permits. Such modifications may occur at existing sources that have been long regulated as major for other pollutants, or at existing sources that become classified as major solely due to their GHG emissions.

Permitting smaller sources and modifications is generally less effective due to the fact that, while there are still administrative costs borne by the source and permitting authority, the environmental benefit of each permit is generally less than what results from permitting a larger source. Congress excluded smaller sources from PSD by adopting 100 and 250 tpy major source cutoffs in 1977 when PSD was enacted, and EPA rules have long excluded smaller sources and modifications from the program. This cutoff would not exclude many smaller sources of GHGs because the mass emissions (i.e., tons per year) of the relevant GHG may be substantially higher than the mass emissions of traditional pollutants for the same process or activity. Thus, while existing cutoffs for traditional pollutants capture a relatively modest number of new and modified sources per year, applying those same major source levels to CO_2, and possibly for other GHG, would capture a very large number of sources, many of which are comparatively smaller in size when compared to ''traditional'' sources. Similarly, for modifications, the current absence of a significance level, or the future adoption of a significance level that is below the current major source thresholds, would subject numerous small changes to PSD permitting requirements.

[267] Some fraction of these small sources are regulated, at least in some areas, by SIPs and state minor source permit programs under section 110 of the CAA.

b. Potential Program Benefits

In the past, EPA has recognized that the PSD program can achieve significant emissions benefits over time as emissions increases from new major sources and major modifications are minimized through application of state-of-the-art technology.[268] As a result, other programs designed to reduce emissions are not compromised by growth in new emissions from PSD sources. Further emissions benefits are achieved when sources limit or reduce emissions to avoid PSD applicability.

A rationale for new source review since its inception has been that it is generally more effective and less expensive to engineer and install controls at the time a source (or major modification) is being designed and built, as BACT does, rather than retrofitting controls absent other construction.[269] In addition, the BACT determination process requires consideration of new emissions reduction technologies, which provides an ongoing incentive to developers of these technologies. There is the potential for avoiding or reducing GHG emissions if ''traditional'' sources begin to install abatement technologies for GHGs as they do for traditional pollutants. On the other hand, as discussed in section III,F, some suggest that regulations that apply stringent requirements to new sources and ''grandfather'' existing sources may create incentives to keep older and inefficient sources in use longer than otherwise would occur, diminishing the incentive for technological innovation and diffusion and reducing the environmental effectiveness and cost effectiveness of the regulation. Others believe that economic factors other than these regulatory differences tend to drive business decisions on when to build new capacity. EPA examined the effect of new source review on utilities and refineries in a 2002 report, as described in section III.F.4 of this notice.[270]

[268] See, for example, Section II of ''NSR Improvements: Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules,'' U.S. EPA, November 21, 2002.

[269] Critics of this rationale suggest that under a market-oriented system covering both new and existing sources, source owners would be best placed to decide whether it is economic to place state-of-the-art controls on new sources.

[270] See U.S. EPA, ''New Source Review: Report to the President, June 2002.'' As noted in section III.F of this notice, the report concluded (pp. 30–31) that, for existing sources, ''[c]redible examples were presented of cases in which uncertainty about the exemption for routine activities has resulted in delay or resulted in the cancellation of projects which sources say are done for purposes of maintaining and improving the reliability,

EPA has not performed an analysis of the GHG emissions that might be avoided or reduced under PSD preconstruction permitting, nor of possible increases through unintended incentives. Such an analysis would necessarily involve new analysis of potential BACT technologies, considering costs and other factors, for GHGs emitted by numerous sectors. The PSD program, through the BACT requirement, might result in installation of such technologies as CCS, or the incorporation of other CO_2 reducing technologies, such as more efficient combustion processes.[271] However, it is not possible at this time to estimate these effects in light of the uncertainty surrounding the future trends in construction at new and modified sources, demonstration of commercial availability of various GHG control technology options, their control effectiveness, costs, and the aforementioned incentives to keep existing sources in operation and avoid modifying them. We ask for comment on the nature (and to the extent possible, the magnitude) of the potential effects of PSD on GHG emissions, and whether these effects vary between new and existing sources.

Regarding the potentially large universe of smaller sources and modifications that could become newly subject to BACT, as described above, there are large uncertainties about the potential benefits of applying BACT requirements to GHG emissions from such sources. Individual emission reduction benefits from such sources would be smaller; however, the cumulative effect could theoretically be large because the requirement would cover many more sources. However, unless there are ways to effectively streamline BACT determinations and permitting for smaller sources (as discussed below), BACT would not appear to be an efficient regulatory approach for many other types of sources. We request comment on the potential overall benefit of applying the BACT requirement to GHG emissions, and how this potential benefit is distributed among categories of potentially regulated sources and modifications. Below, we discuss and ask for comment on possible tailoring of BACT for GHGs.

Finally, in considering the potential for emissions reductions from the PSD program, it is important to note that, historically, sources generally have taken action to avoid PSD rather than seeking a permit, where possible. Companies can reduce their PTE, for example, by artificially capping production or forgoing efficiency improvements. While these PSD avoidance strategies can sometimes reduce emissions (e.g., limiting operating hours or installing other controls to net out), they can sometimes result in forgone environmental benefits (e.g., postponing an efficiency project). These effects are very difficult to quantify. For example, the developer of a large apartment building that would be a major source for CO_2 might elect to provide electric space heat if it were determined that the direct and indirect costs of PSD made installation of gas heat uneconomical. From a lifecycle analysis standpoint, PSD could—depending upon the source of the electricity—lead to either a better or a worse outcome for overall emissions of GHGs. Similarly, because PSD is triggered based on increases over a past baseline, a source considering a potential modification may have an incentive to increase emissions (to the extent that can be done without a modification) for the 2-year period before the modification to artificially inflate the baseline. Similarly, in the electricity sector, a desire to avoid PSD review could be a disincentive for some projects to improve efficiency, because a small increase in utilization of the more-efficient EGU would raise CO_2 emissions sufficiently to trigger review. We solicit comments on the potential indirect effects, adverse or beneficial, that may arise from the incentive to avoid triggering PSD.

c. Administrative Considerations and Implications of Regulating Numerous Smaller Sources

The PSD program is designed to provide a detailed case-by-case review for the sources it covers, and that review is customized to account for the individual characteristics of each source and the air quality in the particular area where the source will be located. Although this case-by-case approach has effectively protected the environment from emissions increases of traditional criteria pollutants, there have been significant and broad-based concerns about PSD implementation over the years due to the program's complexity and the costs, uncertainty, and construction delays that can sometimes result from the PSD permitting process. Expanding the program by an order of magnitude through application of the 100/250-ton thresholds to GHGs, and requiring PSD permits for numerous smaller GHG sources and modifications not previously included in the program, would magnify these concerns. EPA is aware of serious concerns being expressed by sources and permitting authorities concerning the possible impacts of a PSD program for GHGs.

While the program would provide a process for reviewing and potentially reducing GHG emissions through the BACT requirement as it has done for other pollutants, we are concerned that without significant tailoring (and possibly even with significant tailoring), application of the existing PSD permitting program to these new smaller sources would be a very inefficient way to address the challenges of climate change. We ask for comment on how we should approach a determination of (1) whether PSD permit requirements could be appropriate and effective for regulating GHGs from the sources that would be covered under the statutory thresholds, (2) whether PSD requirements could at least be effective for particular groups of sources (and if so, which ones), and (3) what tailoring of program requirements (options for which are described in more detail below) is necessary to maximize the program's effectiveness while minimizing administrative burden and permitting delays. We are particularly interested in how we might make such judgments in light of the limitations on our ability to quantify the costs and emissions reduction benefits of the PSD program, and whether there are specific examples or other data that would help us with such an analysis.

For example, if 100- and 250-ton thresholds were applied to GHGs, the BACT requirement would need to be newly implemented for numerous small sources and modifications that permitting authorities have little experience with permitting. It would also likely involve, for both large and small sources, consideration of new pollutants for which there are limited add-on control options available at this time. Thus, as with setting NSPS, a BACT determination for GHGs would likely involve decisions on how proposed installations of equipment and processes for a specific source category can be redesigned to make those sources more energy efficient while taking cost considerations into account. However,

efficiency and safety of existing energy capacity. Such discouragement results in lost capacity, as well as lost opportunities to improve energy efficiency and reduce air pollution.'' With respect to new facilities, the report said, ''there appears to be little incremental impact of the program on the construction of new electricity generation and refinery facilities.''

[271] However, EPA notes that the BACT requirement does not require consideration of technologies that would fundamentally redefine a proposed source into a different type of source (e.g., BACT for a proposed coal-fired power plant need not reflect emission limitations based on building a gas-fired power plant instead). See, for example, *In re: Prairie State Generating Company,* PSD Appeal No. 05–05, slip op. at 19–37 (EAB 2006).

unlike NSPS, because BACT is typically determined on a case-by-case basis for each facility and changes as technology improves, these decisions would have to take into account case-specific factors and constantly evolving technical information [272]. Due to the more-than-tenfold increase in the number of PSD permits that would be required if the 100- and 250-ton thresholds were applied to GHGs, and the potential complexity of those permitting decisions, state, local, federal, and tribal permitting authorities would likely face significant new costs and other administrative burdens in implementing the BACT requirement for GHGs. Large investments of resources would be required by permitting authorities, sources, EPA, and members of the public interested in commenting on these decisions. Also under this scenario, sources would likely face new costs, uncertainty, and delay in obtaining their permits to construct.

d. Definition of Regulated Pollutant for GHGs

We also note, as described above, that decisions on the definition of regulated pollutant for GHGs—whether GHGs would be regulated as individual gases or as a class—has implications for BACT determinations under the PSD program. If GHGs are regulated separately, it is possible that a control project for one GHG could trigger PSD for another (e.g., controlling methane in a way that increases CO_2). In addition, the economic and other impacts for BACT would need to be evaluated on a pollutant-by-pollutant basis. While regulating GHGs as a class would provide additional flexibility in this area, each BACT analysis would be more extensive because it would have to include combined consideration of all GHGs in the class. We ask for comment on the relative strengths and weaknesses of the various ways to define the regulated pollutant for GHGs as related to the BACT requirement.

e. Other PSD Program Requirements

Other parts of the CAA PSD provisions and EPA regulations that could be affected by bringing GHGs into the program include the requirement to evaluate, in consultation with the Federal Land Manager (FLM), impacts on Air Quality Related Values (AQRVs) in any affected ''Class I area'' (national parks, wilderness areas, etc.), and the need to conduct additional analysis of the proposed source's impacts on ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility, as provided for in section 165(e) of the Act. These requirements can result in adjustments to the permit (for example, permit conditions may be added if a FLM demonstrates to a permitting authority that additional mitigation is necessary to address the impacts of GHG emissions on the AQRVs of a Class I area). Due to the increase in number of permits, permitting authorities may have to make significant programmatic changes to deal with the increased workload to conduct these analytical requirements of the PSD program, and many additional applicants will have to devote resources to satisfying these requirements. In addition, given the uneven geographic distribution of new source growth, some permitting authorities may be required to conduct more permit analyses than others.

f. GHG NAAQS Nonattainment Scenario

If nonattainment NSR were triggered under a GHG NAAQS, the most significant requirement would be the LAER requirement. Because LAER does not allow consideration of costs, energy, and environmental impacts of the emissions reduction technology, the LAER requirement would have the potential to act as a strong technology forcing mechanism in GHG nonattainment areas. On the other hand, once a technology is demonstrated, this mechanism does not allow consideration of the costs, competitiveness effects, or other related factors associated with the new technology. As with PSD requirements, the application of LAER to numerous smaller sources nationwide would raise new issues on which we request comment. For example, with LAER, any demonstrated technology for reducing CO_2 emissions, such as a new efficient furnace or boiler design, could become mandated as LAER for all future construction or modification involving furnaces or boilers. Manufacturers would have to supply technologies that could meet LAER or face regulatory barriers to the market, and could face a constantly changing regulatory level that may result in newly designed products being noncompliant shortly after, or even before, they are produced and sold. New and modified sources would be required to apply the new technology even if it is a very expensive technology that may not necessarily have been developed for widespread application at numerous smaller sources, and even if a relatively small emissions improvement came with significant additional cost. We request comment on how EPA should evaluate the LAER requirement under a NAAQS approach for GHGs. In particular, we ask for information about whether the relatively inflexible nature of the LAER requirement would lead to economic disruption for certain types of sources (and if so which ones), and whether the benefits of a NAAQS approach including LAER would warrant further evaluation and possible tailoring of LAER to address GHGs.

We also ask for comment on any other NSR program issues particular to a NAAQS approach, should EPA decide to establish a NAAQS for GHGs. Although we have not provided a comprehensive discussion of such issues, a number of questions arise that are particular to the NSR requirements that flow from a NAAQS approach. For example, if the entire country were designated nonattainment for GHGs, would the offset requirement function as a national cap-and-trade program for GHG emissions for all major sources? If so, how would such a program be administered, and would the numerous small sources described above be covered? Would the offset requirement argue for regulating GHGs as a group, rather than individually, to facilitate offset trading? What would be an appropriate offset ratio to ensure progress toward attainment? Similarly, for the air quality analysis requirements of PSD, how would a single source determine whether its contribution to nonattainment is significant? When must such a source mitigate its emissions impact, and what options are available to do so? Should EPA set a PSD increment for GHGs if a NAAQS is established? Are there additional issues of interest that we have not raised in this notice?

5. What Are the Possible Implications on Other Provisions of the Clean Air Act?

If PSD for GHGs applied to the same sources as a new market-oriented program to regulate GHGs under the Act, the interaction of the two programs would be a key issue. PSD would ensure that new and modified sources were built with the best available technology to minimize GHG emissions. A traditional argument for NSR is that it ensures that new sources are built with state-of-the-art technology that will reduce emissions throughout the lifetime of that source, which can be several decades. However if the market-oriented program is a cap-and-trade system with sufficiently stringent caps, PSD would not result in more stringent control of new GHG sources than the

[272] The NSPS program does take into account improvements in technology, but does so during the 8-year review of the NSPS under 111(b)(1)(B) rather than on a permit-by-permit basis.

cap-and-trade system alone. In addition, the potential would exist for PSD to interfere with the efficient operation of the GHG cap-and-trade program. Although PSD would neither reduce nor increase the overall emission reductions achieved under the cap, it would force different choices about the stringency and location of controls than if control choices were based solely on market factors. Under this scenario, the result would be to increase costs without achieving additional GHG emissions reductions. For example, assume that a company undertakes a change that triggers PSD at a location where controls are expensive to retrofit but are required as BACT for that location. Without PSD, the company could have increased emissions and still complied with the cap by purchasing less expensive emissions reductions from another source, and the same total GHG emissions reductions would have been achieved. Notably, for GHGs, which have relatively uniform global concentrations, the location of GHG emissions does not matter to global climate impacts, so the policy reasons for the spatial component of PSD control requirement would not apply to GHG controls.

PSD program requirements also affect numerous CAA programs that require stationary source controls that may increase emissions of pollutants other than the pollutant targeted for control (i.e. ''collateral increases''), such as the increased NO_X emissions that result when a thermal oxidizer is installed to control VOC. Because there is no exemption from PSD requirements for such pollution control projects, the collateral increase must be reviewed, which can result in added costs and delay of those pollution control projects. Regulation of GHGs would exacerbate these concerns because the energy demands of many controls for criteria pollutants, HAP, and other pollutants have the potential to result in increased CO_2 emissions.

6. What Are Some Possible Tailoring Approaches to Address Administrative Concerns for GHG NSR?

The cost and potential broad applicability of PSD requirements raises questions about whether GHG regulation through PSD would be more effective in minimizing GHG increases if it operates as a broad program targeting numerous smaller sources and modifications, or as a narrow program targeting smaller numbers of large sources and modifications. We ask for comment on how these cost/benefit considerations for permitting small sources and modifications under PSD, as well as any other factors, should be considered in EPA's deliberations regarding the major source cutoffs and significance levels for GHGs as well as EPA's available legal authority in this area.

EPA believes that whether or not PSD is workable for GHGs may depend on our ability to craft the program to deal with the unique issues posed by GHG regulation.

This section discusses several options, including:

• Reducing the potential universe of sources based on ''potential to emit'' approaches;

• Increasing the major source thresholds and significance levels for GHGs, to permanently restrict the program to larger sources;

• Phasing in the applicability of PSD for GHGs;

• Developing streamlined approaches to implementing the BACT requirement; and

• Issuing general permits for numerous similar sources.

The options are not necessarily exclusive. Many are complementary, and we note that some combination of these options may be most effective. We also ask for suggestions on additional tailoring options not described below, and more generally on which options, if any, present an appropriately balanced means of addressing the administrative concerns.

Before discussing each option in detail, we present an overarching legal discussion that lays out possible rationales for such flexibility. For at least one of the options identified (e.g., the option of adopting higher major source sizes than those contained in the Act), the principal legal constraint is the ''plain meaning'' of the applicable PSD provisions, such as the major source levels. Nonetheless, we have identified two legal doctrines that may provide EPA with discretion to tailor the PSD program to GHGs: Absurd results and administrative necessity.

The Supreme Court has stated that the plain meaning of legislation is not conclusive ''in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters' * * * [in which case] the intention of the drafters, rather than the strict language, controls.'' *U.S.* v. *Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242 (1989). To determine whether ''the intentions of the drafters'' differs from the result produced from ''literal application'' of the statutory provisions in question, the courts may examine whether there is a related statutory provision that conflicts, whether there is legislative history of the provisions in question that exposes what the legislature meant by those terms, and whether a literal application of the provisions produces a result that the courts characterize variously as absurd, futile, strange, or indeterminate. See, e.g., *id., Nixon* v. *Missouri Municipal League,* 541 U.S. 125 (2004); *United States* v. *American Trucking Association, Inc.* 310 U.S. 534 (1940); *Rector of Holy Trinity Church* v. *U.S.,* 143 U.S. 457 (1892).

Further, the administrative burdens that would result for the federal and state permitting authorities, as well as the sources, from a literal application of the PSD provisions give rise to consideration of whether EPA can craft relief from a strict interpretation based on the judicial doctrine of administrative necessity. In *Alabama Power,* the D.C. Circuit addressed various instances of claimed administrative burdens resulting from the application of the PSD statutory provisions and efforts by EPA to provide regulatory relief. *Alabama Power Co.* v. *Costle,* 636 F.2d at 357–60 (D.C. Cir. 1980). In a section of its opinion titled ''Exemptions Born of Administrative Necessity,'' the Court stated,

> Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them.

Id. at 357. The Court identified several types of administrative relief. One is ''[c]ategorical exemptions from the clear commands of a regulatory statute,'' which the court stated are ''sometimes permitted,'' but emphasized that they ''are not favored.'' *Id.* at 358. A second is ''an administrative approach not explicitly provided in the statute,'' such as ''streamlined agency approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress.'' *Id.* A third is a delay of deadlines upon '' 'a showing by [the agency] that publication of some of the guidelines by that date is infeasible.' '' *Id.* at 359 (quoting *NRDC* v. *Train,* 510 F.2d 692, 712 (D.C. Cir. 1974). The Court indicated it would evaluate these choices based on the ''administrative need to adjust to available resources * * * where the constraint was imposed * * * by a shortage of funds * * *, by a shortage of time, or of the technical personnel needed to administer a program.'' *Id.* at 358.

a. Potential-to-Emit: Reducing the Number of Sources Potentially Covered

Applicability of PSD is based in part on a source's ''potential to emit'' or PTE. The PTE concept also is used for applicability of nonattainment NSR, Title V, and the air toxics requirements of section 112. We discuss PTE in detail here, but the issues and questions we discuss in this section apply equally to these other programs. As noted above, PTE is defined as the maximum capacity of a source to emit any air pollutant under its physical and operational design. In the case of sources that are not operating for part of the year, the PTE for many types of sources counts the emissions that would be possible if those sources did emit year round.

EPA believes that an important threshold question is how to interpret ''maximum capacity * * * to emit * * * under its physical and operational design'' for commercial and residential buildings, and other types of source categories that might be subject to PSD and Title V solely due to GHG emissions. For example, in the case of a furnace at a residence, is it appropriate, in calculating the furnace's PTE, to assume that a homeowner would set the thermostat at a level that would require the furnace to operate continuously throughout the year? Even on a cold winter day, a furnace typically turns on and off throughout the day, and as the weather warms, the number of operating hours decreases until the weather warms to the point where the furnace is not needed at all and is shut off for an extended time.

The EPA has in a few instances provided guidance on PTE calculation methodologies to account for category-specific considerations. For example, we issued technical guidance for calculating PTE from grain elevators that took into account inherent limitations on the amount of grain that could be handled due to the fact that grain is only available for handling during a relatively short harvest period, and is further limited by the amount of grain capable of being grown (as represented by a record crop year adjusted for future increases in crop yield) on the land that would ever reasonably be served by the elevator.[273] We ask for comment on whether, for smaller GHG sources like these, there could be appropriate methodologies for defining PTE in ways that consider these common-sense limitations on a source's operation, but still reflect the maximum capacity to emit of a source.

Sources with PTE exceeding the major source threshold can become minor sources by taking legally and practically enforceable limits on their PTE, by, for example, agreeing to operate only part of the year, or only so many hours per day, or by employing control devices.[274] Many sources are able to avoid classification as ''major'' by taking such limits.

The estimates provided for potential new permits for GHG sources outlined in section VII.D.2 above are based on actual emissions. Were they based on PTE, and if year-round operation were assumed to represent PTE for all source categories, the estimates would likely be an order of magnitude higher (in the absence of actions to limit the scope of the programs). This emphasizes the significance of the interpretation of ''potential to emit'' for buildings and other categories not traditionally subject to PSD, as well as the importance of streamlined mechanisms for obtaining limits on PTE.

For traditional PSD and Title V permitting, the PTE limit is typically a source specific limit that is crafted in a facility's minor source permit and tailored to the source's individual circumstances. If it were necessary to create PTE limits for very large numbers of GHG-emitting sources nationwide, this would certainly require a more efficient approach than creating them through individual minor source permits. Not only would the sheer volume of permits and the process required for each one severely strain permitting authority resources, but some state and local agencies may lack the authority to establish minor source permit limits for non-NAAQS pollutants. In addition, while sources may not seek PTE limits for PSD until they have planned modifications that could otherwise trigger PSD, sources may seek PTE limits for Title V purposes as soon as the program is effective, meaning that the approach would need to deal with a large number of sources at essentially the same time.

We ask for comment on whether we should also therefore consider streamlined regulatory approaches for creating the legally and practically enforceable limits sources need without requiring a huge number of individual minor source permits. A possible mechanism could involve adopting a regulation that sets forth operational restrictions that limit PTE for a broad class of sources. We may wish to consider adopting—or encouraging state permitting authorities to adopt—rules for numerous categories where we expect there to be large numbers of sources whose actual emissions are not major but who have major PTE (unless addressed through interpreting maximum capacity as described above). Such a rule could, for example, limit a source's natural gas usage to 1700 MM BTU (17,000 therms) per year, which would keep it below the 100 tpy cutoff for Title V.[275] Typically, the rule would also build in some operating margin so that the limit is not right at the major source cutoff. The rule would have to include recordkeeping and reporting, which would be simple here since fuel use is metered. This approach may be a streamlined effective way to limit PTE for many sources with fuel combustion equipment, provided they can agree to comply with the limits in the rule, even in an abnormally long, cold winter. We ask for comment on stakeholders' experience with limiting PTE by rule rather than through individual permits, possible considerations in tailoring this approach to GHG sources, and identification of categories that might benefit from the use of rules limiting PTE.

Finally, where the establishment of a rule-based PTE limit for an entire source category is not recommended or is infeasible, the EPA requests comment on whether general permitting approaches might be useful. A general permit is a permit that the permitting authority drafts one time, and then applies essentially identically (except for some source-specific identifying information) to each source of the appropriate type that requests coverage under the general permit. Similar to the type of rules limiting PTE described above, a general permit could also limit PTE by setting out the operational restrictions (e.g., fuel combusted per

[273] Calculating Potential to Emit (PTE) and Other Guidance for Grain Handling Facilities: November 14, 1995 memorandum from John S. Seitz, Director, U.S. EPA Office of Air Quality Planning and Standards, to EPA Regional Offices.

[274] Current regulatory language allows consideration of such limits in calculating PTE only if they are federally enforceable, but this definition was vacated or remanded in three separate cases—one for PSD/NSR (*Chemical Manufacturers Assn* v. *EPA,* No. 89–1514 (D.C. Cir. Sept. 15, 1995), one for Title V (*Clean Air Implementation Project* v. *EPA*, No. 96–1224 (D.C. Cir. June 28, 1996), and one for section 112 (*National Mining Association* v. *EPA,* 59 F. 3d 1351 (D.C. Cir. 1995). EPA is developing a rule to respond to these cases and in the meantime is following a transition policy that does not require federal enforceability.

[275] Although the PSD cutoff may in some cases be 250 tpy, sources will generally adopt PTE limits below 100 tpy to avoid both PSD and Title V applicability where they have the option to do so. For this reason, this example uses a 100 tpy cutoff, though in some cases PTE limits are taken to stay below a 250 tpy cutoff.

year) necessary to assure the GHG emissions stay below major source thresholds, and would also spell out records the source would have to keep to assure it met these restrictions. To be most useful, the permit would need to address large numbers of similar sources. This approach may also work well for many types of GHG sources as well. We request comment on the use of a general permit approach to limiting PTE, and whether it would offer additional benefit over the approach of establishing operational restrictions directly by rule.

b. Options for Setting Higher GHG Major Source Cutoffs and Significance Levels

If the EPA ultimately determines that subjecting numerous small sources and modifications to PSD is not an effective way to address GHG emissions, one possible option for tailoring the program would be to raise the major source cutoffs (e.g., raise the threshold only for GHGs as a class, or perhaps only for certain individual GHGs) and establish a significance level for GHGs at a level high enough to assure that the program applies to larger sources and modifications, but excludes smaller sources and modifications. Since the existing major source thresholds are set forth in the CAA itself, EPA would need to find the legal flexibility to raise these thresholds above 250 and 100 tons per year. We present for discussion below several policy and legal options for higher major source cutoffs and significance levels.

i. Higher GHG major source cutoffs—possible approaches and legal basis

Regardless of how PTE is calculated, the major source size threshold will be a critical consideration in tailoring the PSD program for GHGs. There are a number of factors one might consider in choosing an appropriate cutoff for GHGs and whether to establish the cutoff for individual gases such as CO_2 or for GHGs as a class. One conceptual approach might be to identify the number of sources and modifications affected by various cutoffs, calculate the costs and benefits of a PSD program for that universe of affected sources, and select a cutoff that optimizes the benefit-cost ratio. Unfortunately, we presently have the ability to quantify in dollar terms only a subset of the climate impacts identified by the IPCC. Also, we have very limited data on the number of sources expected at various major source cutoffs, and even more limited data on the number of modifications at various significance levels. More importantly, it is very difficult to project the future number of permits or the incremental impact of any additional GHG reductions that would result from the control technology decisions therein. For these reasons, EPA cannot quantitatively determine an optimal major source size or significance level.

We could, however, consider other means of setting levels. One example is an emissions scaling approach. This approach would compare the emissions of other existing NSR pollutants for sources that are major and would calculate the corresponding GHG emissions that the same source would emit. This would be an appropriate approach if the goal were to tailor PSD applicability for GHGs to cover a similar universe of source sizes and types to the universe now regulated for other pollutants. A second option would be to base the major source size on a scientific determination of a level below which an individual source would have a *de minimis* contribution to any particular adverse climate-related impact on a relevant health, societal, or environmental endpoint. Although it may be possible to generally estimate such a level, we are not currently aware of any scientific literature that establishes a specific numeric threshold below which GHG emissions are *de minimis*, either in terms of their impact on climate, or on these endpoints. By the same token, aside from an ability to use currently available models to project temperature effects, the Agency does not have the ability to project specific climatic impacts or endpoints resulting from individual sources. Alternatively, we could potentially choose a GHG major source size that is selected to harmonize with GHG cutoffs from other regulatory programs. For example, the DOE's 1605(b) program has a threshold of 10,000 metric tons of CO_2-equivalent, California's AB32 regulation for mandatory reporting of GHGs has a threshold of 25,000 metric tons of CO_2-equivalent, and the Wisconsin emission inventory reporting requirements has a CO_2 threshold of 100,000 short tons. Notably, these examples are thresholds for reporting requirements only. PSD would involve much more than simply reporting emissions, so under a harmonizing approach we may need to evaluate whether it is feasible to require not only reporting, but also the other PSD elements for the sources that would be covered. We ask for comment on the range of approaches EPA could take in selecting a major source cutoff if we decide it is appropriate under existing legal authority, if available, to develop a higher cutoff for GHGs. In addition, we request data that may be useful for conducting necessary analysis to support such approaches.

A related issue to the establishment of the major source thresholds and significance levels for GHGs is the selection of the metric against which these levels are evaluated. Emissions of GHGs are typically expressed in a common metric, usually the metric called CO_2-equivalent, although the measure known as Carbon Equivalent (CE) is also used. The use of either metric allows the impact of emissions of different GHGs to be directly compared, as some gases have a higher global warming potential or GWP than others. Since both units are measured in weight—usually tons—either could be used for purposes of PSD applicability. The use of either metric has the advantage of linking emissions of a GHG directly to its ability to impact climate, appropriately regulating more potent GHGs more stringently. The use of CO_2-equivalent would solve the problem of leaving unreviewed significant GHG emissions of some chemicals, such as hydrofluorocarbons, but it would leave many small CO_2 sources with less climate impact still subject to PSD. However, the use of Carbon Equivalent (CE) addresses both concerns. The attached table demonstrates the possible effect of using CE in making PSD applicability decisions:

	GWP	Emissions equal to 250 tons CE
Carbon dioxide (CO_2)	1	917 tons.
Methane (CH_4)	21	44 tons.
Nitrous oxide (N_2O) ..	310	3 tons.
Hydrofluorocarbon (HFC)–134a.	1300	1410 lbs.

As the table shows, it would take more CO_2 emissions to reach the major source size for CE. However. it would take substantially less of several other GHGs. Such an approach would likely result in fewer sources being added to the PSD program for GHGs in total. While more sources for several GHGs would be considered major, the major source population is, as noted above, dominated by CO_2, and there would be fewer sources classified as major due to CO_2 emissions. This approach arguably would regulate significant sources of potent GHG while also reducing the burden on relatively small sources of CO_2, focusing efforts on the sources with the most important climate impacts. EPA seeks comments on the potential use of the CE measure as the means to determine PSD applicability. Specifically we ask for comment on the appropriateness of the metric (considering that CO_2, rather than carbon, is the air pollutant), data regarding its effect on PSD applicability, and views concerning whether such an approach fits within the language of the CAA.

Whether, and the extent to which, EPA has flexibility to limit the application of the PSD permitting requirements (and, by extension, the nonattainment NSR permitting requirements if a NAAQS is set for GHGs) to sources that emit larger amounts of CO_2 and other GHGs than the 100/250 tpy thresholds depends on the interpretation of the key PSD definitional term, ''major emitting facility.'' Under CAA section 165(a), the basic PSD applicability requirement is that a ''major emitting facility'' may not construct unless it has received a permit that covers specified requirements.[276] As defined by CAA section 169(1), a ''major emitting facility'' is defined to include (i) ''any * * * stationary source[]'' that emits or has the potential to emit 100 tpy or more of any air pollutant and that falls into one of 28 specified industrial source categories; and (ii) ''any other source with the potential to emit 250 tons per year or more of any air pollutant.'' However, the last sentence of this definition allows states to exempt ''new or modified facilities which are nonprofit health or educational institutions'' from the PSD program. EPA's regulations, promulgated in 1980 and revised several times since then, make clear that emissions count toward the 100/250 tpy thresholds only if they are ''regulated NSR pollutant[s]'' (e.g., 40 CFR 52.21(b)(1)(i)(a)), the specific meaning of which is discussed elsewhere in this notice.

Once GHGs are regulated, these PSD provisions, by their terms, would apply to sweep into the PSD program new sources that emit 100 or 250 tpy of CO_2 or other GHGs. As indicated above, the courts have held that the plain meaning of statutory provisions is generally controlling. Even so, we solicit comment on whether these PSD threshold requirements may present one of those rare cases in which congressional intent differs, based on the legislative history.

The legislative history indicates that Congress was aware of the range of stationary sources that emitted pollution and did not envision that PSD would cover the large numbers of smaller sources within that inventory. As the D.C. Circuit stated in *Alabama Power,* the seminal court decision regarding PSD that reviewed numerous challenges to EPA's initial set of PSD regulations,

> Congress's intention was to identify facilities which, due to their size, are *financially able* to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are *primarily responsible* for emissions of the deleterious pollutants that befoul our nation's air.

636 F.2d. 323, 353 (D.C. Cir. 1980) (emphasis added). In addition, Congress also sought to protect permitting authorities from undue administrative burdens. *See* S. Rep. 95–127 at 97; *Alabama Power,* 636 F.2d at 354.

One important indication that Congress viewed PSD as limited in scope may be found in information provided by EPA in 1976 and included in the *Congressional Record*: A comprehensive list of industrial and commercial source categories, which included the amounts of certain pollutants emitted by ''typical'' sources in those categories and the number of new plants in those categories constructed each year. 122 Cong. Rec. S 24548–50 (July 29, 1976) (statement of Sen. McClure). The pollutants included particulate matter (PM), sulfur dioxide (SO_2), carbon monoxide (CO), and hydrocarbons. The two largest of these source categories consisted of—

• Small boilers, those that generate between 10 MMbtu/hr and 250 MMbtu/hr. EPA estimated that 1,446 new plants with boilers of this size were, at that time, constructed each year, and that the amount of PM emissions with controls from a ''typical'' such boiler were 53 tpy.

• Very small ''boilers,'' those that generate between 0.3 MMBtu/hr and 10 MMBtu/hr. EPA estimated that 11,215 new plants with boilers of this size were, at that time, constructed each year, and that the amount PM emissions with controls would be 2 tpy.

The D.C. Circuit indicated, in *Alabama Power*, that Congress did not believe sources with boilers of these small sizes should be covered by PSD: ''[With respect to] the heating plant operating in a large high school or in a small community college * * * [w]e have no reason to believe that Congress intended to define such obviously minor sources as 'major' for the purposes of the PSD provision.''[277] 636 F.2d at 354. To support this proposition, the Court cited a statement in the *Congressional Record* by Sen. Bartlett arguing that the PSD provisions should not cover ''[s]chool buildings, shopping malls, and similar-sized facilities with heating plants of 250 million BTUs.'' *Id.* at 354 (*citing* 122 Cong. Rec. S. 12775, 12812 (statement of Sen. Bartlett)). Yet, boilers of even this small size could well emit at least 250 tpy of CO_2 and therefore could fall into PSD permitting requirements if the definition of ''major emitting facility'' is read to include emitters of CO_2 of that size or more.

Thus, it is clear that Congress's construct of PSD—specifically, the 100/250 tpy thresholds—was based on Congress's focus on conventional pollutants at that time and its understanding that sources emitting conventional pollutants above those levels should be subject to PSD, with its attendant cost burdens, both because such sources have the financial resources and because they have the responsibility to reduce their large share of the convention pollution problems. Limited administrative resources were also part of this equation. But the equation is scrambled when CO_2 is the pollutant because many smaller sources, with limited resources, and whose share of the GHG emissions problem is no greater than their share of the conventional pollution problem, get swept into PSD at those threshold levels. Further, administrative resources become greatly stretched. Juxtaposing the limited scope of the universe of PSD sources that Congress had in mind against the broad terms that Congress used in defining ''major emitting facility,'' which determines PSD applicability, raises the question of whether a narrower interpretation of those terms may be permissible under various judicial doctrines.

We solicit comment on whether the case law cited above, concerning narrowing the application of statutory provisions in light of other indications of congressional intent or in light of administrative necessity, support interpreting the term, ''major emitting facility'' in a manner that is narrower than the literal meaning of the phrase, ''any other source'' in the case of sources that emit amounts of CO_2 that are more than 250 tpy but less than the levels discussed above.

[276] The requirement to obtain a permit applies to a source that commences construction after the effective date of the 1977 Clean Air Act Amendments (August 7, 1977), and that does so ''in any area to which [the PSD provisions] appl[y].'' All parts of the United States and its possessions are covered (see CAA sections 161, 302(d) and (q), and 110(a)(1)), but if EPA promulgates a NAAQS for GHGs and designates certain areas as nonattainment, then those areas would not be covered.

[277] Although Congress specifically authorized the States to exempt ''nonprofit health or education institutions'' from the definition of ''major emitting facility'' this statement by the D.C. Circuit should be taken as the Court's view that Congress did not design PSD to cover sources of the small size described.

ii. Modifications: Options and Legal Basis for Higher GHG Significance Levels

Regarding the selection of a significance level for GHG emissions, we could follow a *de minimis* approach, as we have done in setting the existing PSD significance levels. We could base the significance level on the level below which an individual modification has a *de minimis* contribution to climate change. A scaling approach similar to that discussed above for the major source threshold is also an option for setting the significance level. We could set the significance level to a level of GHG emissions that corresponds to the same activity level as the significance levels for other pollutants, so as to roughly maintain the same permitting burden for GHGs as for ''traditional'' pollutants. We ask for comment on the merits of these approaches and invite suggestions on other approaches. We are also interested in specific information that would help us analyze how the selection of various significance levels would affect the number and types of modifications affected.

The legal rationale for establishing a significance level is found in the D.C. Circuit's *Alabama Power* decision, 636 F.2d at 405, where the Court authorized EPA to establish ''a *de minimis* standard rationally designed to alleviate severe administrative burdens.'' The Court elaborated:

> A rational approach would consider the administrative burden with respect to each statutory context: what level of emission is *de minimis* for modification, what level *de minimis* for application of BACT. Concerning the application of BACT, a rational approach would consider whether the *de minimis* threshold should vary depending on the specific pollutant and the danger posed by increases in its emission. The Agency should look at the degree of administrative burden posed by enforcement at various *de minimis* threshold levels.* * * *It may * * * be relevant * * * that Congress made a judgment in the Act that new facilities emitting less than 100 or 250 tons per year are not sizeable enough to warrant PSD review.*

Id. (emphasis added). We believe that this approach entails broad discretion in fashioning a *de minimis* level, consistent with the overarching principle of obviating administrative burdens that are not commensurate with the contribution of the amount of emissions to the pollution problem. We consider the Court's emphasized statement to leave the door open to setting significance levels at the same level as the applicability threshold levels. We solicit comment on appropriate GHG significance levels, and on the relationship of significance levels to the GHG applicability thresholds discussed above.

c. Phase-In of PSD Permitting Requirements

Absent higher major source cutoffs and significance levels, it would be necessary to formulate a strategy for dealing with the tenfold increase in required permits that EPA projects permitting authorities will experience if GHGs become regulated for PSD purposes. Even with advance notice, an increase of this magnitude over a very short time could overwhelm permitting authorities. They would likely need to fund and hire new permit writers, and staff would need to develop expertise necessary to identify sources, review permits, assess control technology options for a new group of pollutants (and for a mix of familiar and unfamiliar source categories), and carry out the various procedural requirements necessary to issue permits. Sources would also face transition issues. Many new source owners and operators would need to become familiar with the PSD regulations, control technology options, and procedural requirements for many different types of equipment. If the transition were not effectively managed, an overwhelmed permit system would not be able to keep up with the demand for new pre-construction permits, and construction could be delayed on a large number of projects under this scenario.

The size of the increase in workload that must be accommodated and the potentially serious consequences of an overly abrupt transition demonstrate that a phase-in approach may have merit. Under one concept of a phase-in approach, EPA could phase-in PSD applicability beginning with the largest sources of GHGs and gradually include smaller sources. This could be accomplished by initially adopting a relatively high major source size and significance level, and then periodically lowering the level until the full coverage level is reached. We ask for comment on what an appropriate transition time would be, what the appropriate starting, middle, and end points would be in terms of coverage, and what requirements, if any, should be put into place for sources prior to their being phased in. For example, if the ultimate goal is to reach a 250 tpy major source cutoff, what would be the appropriate starting cutoff (e.g., 10,000 tpy) and how should it be determined? Would the phase-in need to be complete by a certain date, and if so how long should the phase-in take? Alternatively, could the phase-in of the smaller sources proceed by setting up periodic EPA evaluations of the administrative necessity for deferring applicability for such sources, and applying PSD only after we determine that it is feasible to do so? We also ask for comment on what activities occurring over this time we should consider in structuring a phase-in.

As noted elsewhere, in its broad review of the initial PSD program promulgated under the 1977 Clean Air Act Amendments, the D.C. Circuit set out a range of mechanisms through which an agency can, at least under ''limited'' circumstances, provide relief on grounds of ''administrative necessity'' from even clear statutory mandates, as long as those mandates do not unambiguously foreclose such relief. *Alabama Power*, 636 F.2d at 357. The Court noted that an agency could establish the need for such relief based on ''a shortage of funds[,] * * * time, or * * * technical personnel.'' *Id.* at 358.

As described above, the large number of sources that would become subject to the PSD requirements at the 100/250 tpy levels would strain the administrative resources of the State permitting authorities and perhaps also of the EPA regional offices that issue PSD permits. Each of the constraints noted by the Court in *Alabama Power*—funds, time, and technical personnel—would arise.

Elsewhere in this notice, we solicit comment on whether ''administrative necessity'' authorizes EPA to exempt categories of smaller GHG emitters. Here, we solicit comment on phasing-in the applicability of the permit program over a multi-year period, with successively smaller sources becoming subject. This method could allow an orderly ramp-up in funding and in essential human capital. Under such an approach, we also seek comment on whether it would be necessary to set a firm schedule for phase-in, or whether it is sufficient for the agency to select a future date to assess the level of program coverage and the associated administrative burden, and determine at that time whether it is appropriate to add them to the program, and if not, to set an additional future date to revisit the issue. We request information that would help us determine the appropriate timeframe for such assessments, including the current and anticipated state resources for processing PSD permits, including numbers of permitting personnel, and the time period and person-hours needed to issue a typical permit.

d. Streamlining Determinations of Required Controls

As previously noted, one of the most significant aspects of the PSD program for GHGs is the BACT requirement. While permitting authorities are accustomed to making BACT determinations on a case-by-case basis for major sources and modifications under the current PSD program, BACT for GHGs (particularly CO_2) presents significant additional permitting challenges. The primary challenge is the dramatic increase in the number of sources and modifications that under the 100/250-ton thresholds would be subject to BACT review and the new source categories that would be brought into the PSD program, which could exceed the capacity of the permitting system and have negative effects described above in section VII.D.4. An additional challenge stems from the fact that for some GHG-emitting activities, primarily CO_2 from combustion sources, permitting authorities will need to look at alternative approaches to determining BACT such as setting efficiency targets, if add-on controls are not viewed as adequately demonstrated. While there is much information available on efficiency for some of the various kinds of equipment used by these newly applicable sources, permit engineers will need to understand this information for a very wide range of source categories.

This section seeks comment on approaches for streamlining the BACT process for many new smaller sources that could be brought into the PSD program based on their GHG emissions. Under PSD, BACT is a case-by-case decision that reflects the state-of-the-art demonstrated control technology at the time of the permit action. Thus, BACT changes over time and requires continual updating. Determining BACT is also a decision that affords permitting authorities flexibility to consider a range of case-specific factors such as cost, energy, and environmental impacts. However, full case-by-case consideration of those factors requires significant data and analysis in order for permitting authorities to arrive at a permitting decision that is appropriate for each individual source or modification

EPA is interested in whether there would be ways to move from a PSD permit system in which BACT limits are set on an individual case-by-case basis to a system in which BACT determinations could be made for common types of equipment and sources, and those determinations could be applied to individual permits with little to no additional tailoring or analysis. EPA has previously introduced this concept, known as ''presumptive BACT,'' as an aid to streamlining permitting for desulfurization projects at refineries as well as in other instances,[278] and some state permitting authorities have adopted similar approaches in their air permitting programs.[279] Based on our understanding of the types of sources that will become subject to PSD if GHGs are regulated with a major source size of 250 tpy of emissions, we believe the presumptive BACT process could offer significant streamlining benefits. These benefits arise because many of these smaller sources will likely have very similar emissions producing equipment, and there will be little variation across sources with respect to the cost, energy, and environmental considerations in the BACT decision.

While the CAA states that PSD permits shall be issued with BACT determinations made for each pollutant on a ''case-by-case basis,'' the court in *Alabama Power* recognized that exceptions may be appropriate where ''*case-by-case determinations*, would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress.'' 636 F.2d at 358 (emphasis added). The court recognized that such streamlining measures may be needed when time or personnel constraints or other practical considerations ''would make it impossible for the agency to carry out its mandate.'' See *id*. at 359. Given the more-than-tenfold increase in new sources that would likely be brought into the PSD program once GHGs are regulated and the other challenges described above, maintaining a traditional PSD permitting program with individual case-by-case BACT determinations may be impractical, warranting streamlined regulatory approaches as allowed under the Act. A presumptive BACT permitting program would allow EPA, state and local permitting authorities to carry out the PSD program in a timely and efficient manner necessary to promote (rather than hinder) control of GHG emissions from the many new, small source categories that would be required to have PSD permits based on their GHG emissions, while still preserving opportunities for public participation.

In considering a change from case-by-case BACT determinations to a presumptive BACT process for some specific source categories within the PSD program, EPA is considering how such presumptive BACT limits should be established and used, and what provisions in the CAA would set requirements or limits on their establishment and use. In particular, EPA recognizes the statutory requirement to set BACT limits on a case-by-case basis after taking into account site-specific energy, economic, and environmental impacts (otherwise known as collateral impacts). One option would be to allow permitting authorities to adjust any BACT limit that was based on presumptive BACT, as necessary, upon identifying significant collateral impacts applicable to a specific source. EPA also recognizes the requirement to subject proposed PSD permits, and the BACT limits contained within them, to public notice and comment before such permits become final. A presumptive BACT program could be designed to establish presumptive emissions limits for a particular category of sources through guidance that would be issued only after public notice and comment procedures. Another approach could be to allow presumptive BACT limits in each permit to become final only if public comments fail to establish that significant case-specific energy, economic, and/or environmental impacts require adjustment of the presumed limit for that particular source.

In addition, while case-by-case BACT determinations allow for the continual evolution of BACT requirements over time (as controls applied in prior permits are considered in each subsequent case-by-case BACT determination), EPA recognizes that application of presumptive BACT to a category of sources over many permitting decisions may somewhat diminish PSD's incentives for improved technology. EPA is interested in options that would help maintain advances in control technologies, such as a requirement to update and/or strengthen the presumptive BACT at set intervals (such as after 3 years). EPA seeks comment on all aspects of the use of presumptive BACT limits within the PSD program, including EPA's authority to do so, whether there is need for and value to such an approach, and suggestions for how such limits could be established, updated, and used consistent with the requirements of the CAA.

[278] See January 19, 2001 memo from John S. Seitz, Director, Office of Air Quality Planning and Standards to the Regional Air Division Directors entitled, ''BACT and LAER for Emissions of Nitrogen Oxides and Volatile Organic Compounds at Tier 2/Gasoline Sulfur Refinery Projects.''

[279] For example, Wyoming has a minor source permitting program that includes a BACT analysis, and they use a presumptive BACT process for issuing minor source permits to a particular source category—oil and gas production facilities. See Permitting Guidance for Oil and Gas Production Facilities, Wyoming Dept. of Environmental Quality, Air Quality Division (August 2007 revision).

The central component of a presumptive BACT approach would be the recurring technical determination, subject to notice and comment, of the presumptive BACT levels for various categories. Because of the limited data we currently have about the number and types of sources that would become subject to the BACT requirement for GHGs, we cannot at this time predict how many or which source categories might benefit from such an approach if we opt to pursue it. We seek comment on the basis we could use in setting the presumptive BACT level. Considerable work will be needed to determine what options exist for controlling GHG emissions from these categories of smaller sources and the various emitting equipment they use. Even if a determination is made that add-on controls for CO_2 from combustion sources are adequately demonstrated, it is unlikely that the application of these controls would be cost-effective at these small sources in the relatively near future. Thus the focus of presumptive BACT for CO_2 would likely be on energy efficiency standards for the installed equipment.

While PSD permitting staff generally would not possess specialized knowledge in the area of energy efficiency for categories of small sources, there is experience within EPA and other agencies that could help inform the establishment of presumptive BACT. Both EPA and DOE, for example, have extensive experience in deploying cost effective technologies and practices to reduce greenhouse gases from a wide range of emissions sources in support of the President's GHG intensity goal. For example the Energy Star program promotes efficient technologies through a labeling program that establishes performance-based specifications for determining the most efficient products in a particular category, which then qualify for the Energy Star label. To develop these specifications, EPA and DOE use a systematic process that relies on rigorous market, engineering, and pollution savings analyses as well as input from stakeholders. While Energy Star specifications generally cover electrical appliances or fuel combusting appliances that would be smaller than those triggering the BACT requirement, the types of analyses conducted for Energy Star could inform the presumptive BACT process. In addition, DOE's Energy Efficiency and Renewable Energy program sets standards for several types of equipment, some of which may be affected by the BACT requirement if GHGs are regulated, including furnaces, boilers, and water heaters. The DOE standards are similar to the concept of presumptive BACT in that they take cost into consideration and are updated over time.[280] They also take into account effects on competitiveness among equipment manufacturers, which could be a significant concern if left unaddressed in determining presumptive BACT. We ask for comment on whether these or other similar programs could serve as a basis for the setting of presumptive BACT where applicable.

Regarding LAER, we note that, as previously discussed, if a NAAQS were established for GHG at levels lower than current concentrations, the relevant technology requirement would be LAER, not BACT. We ask for comment on whether the presumptive BACT approach would have utility for LAER and whether the particular statutory language of the LAER requirement would allow a presumptive approach under the same legal principles laid out for BACT.

Finally, while presumptive BACT or LAER may have the potential to help address the problem of numerous small but similar types of sources, it is likely of less value in making BACT or LAER determinations at the types of large sources that have generally been subject to PSD for traditional pollutants. This is because there is generally less similarity among these traditional sources. Nonetheless, as noted above, there may be numerous modifications that will be newly subject to PSD for GHGs at such sources, and there may also be issues unique to establishing control technology requirements for GHGs that do not presently exist for such sources. We ask for comment on whether there are issues at traditional PSD major sources that arise for GHGs and that would not be addressed by a presumptive BACT approach. If so, we ask for comment on additional options for tailoring the BACT requirement to address these issues.

e. General Permits for Streamlined Permitting of Numerous Similar Sources

An approach closely linked with the presumptive BACT concept is the concept of a general permit for PSD. A general permit is a permit that the permitting authority drafts one time, and then applies essentially identically (except for some source specific identifying information) to each source of the appropriate type that requests coverage under the general permit. Congress expressly codified the concept of general permits when it enacted the Title V program (discussed below) and states have been using general permits and similar process for years in their own permit programs, particularly for minor source NSR [281] and operating permits. Due to the case-by-case nature of PSD permitting for "traditional" major sources and the differences among individual PSD sources, there has not been much interest or activity in general permitting for PSD. However, if one or more GHGs (particularly CO_2) become regulated pollutants, this approach merits strong consideration due to the large number of sources that EPA expects will become newly subject to PSD for their GHG emissions and the similar characteristics of many of these sources.

Although there is no provision in the CAA that expressly authorizes the use of general permits in the PSD program, the D.C. Circuit, in the *Alabama Power* case described above, recognized that "[c]onsiderations of administrative necessity may be a basis for finding implied authority for an administrative approach not explicitly provided in the statute" and expressly identified general permits as an alternative to the exemptions that were at issue in that case. *See* 636 F.2d at 360. Further, courts have recognized EPA's authority to use general permits under section 402 of the Clean Water Act without an express provision authorizing such general permits. *Environmental Defense Center* v. *EPA*, 344 F.3d 832, 853 (9th Cir. 2003) ("General permitting has long been recognized as a lawful means of authorizing discharges.") (citing *NRDC*. v. *Costle*., 568 F.2d 1369, 1381 (D.C. Cir. 1977)); *NRDC* v. *Train*., 396 F. Supp. 1393, 1402 (D.D.C. 1975) (EPA has "substantial discretion to use administrative devices, such as area permits, to make EPA's burden manageable.").

In considering the use of general permits within the PSD program, EPA is considering how such general permits would be established and used, and what provisions in the CAA might limit their establishment and use. One consideration in establishing PSD general permits is the requirement in CAA section 165(a)(2) that permits be issued after "a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations." One possible approach for fulfilling the public participation requirement is the approach followed for Title V general

[280] See, e.g., 42 U.S.C. 6295(o).

[281] The minor NSR is a NAAQS-based program for review of minor sources that is distinct from the PSD program. It is not discussed here.

permits in 40 CFR 70.6(d), which provide that permitting authorities may establish general permits after following notice and comment procedures required under 40 CFR 70.7(h) and then grant a source's request to operate under a general permit without repeating the public participation procedures. Other considerations for establishing general permits under the PSD program include determining BACT on a case-by-case basis (as discussed in the previous section), and the other requirements referred to earlier in this section concerning the evaluation of impacts on AQRVs in Class I areas and the analysis of air quality and other potential impacts under CAA section 165(e).

EPA seeks comment on the use of general permits within the PSD program, including both EPA's authority to do so and suggestions for how general permits would be established and used consistent with the requirements of the CAA and identification of source categories that could benefit from such an approach. We also ask for comment on whether a general permit program approach could also work for nonattainment NSR in the event the EPA promulgates a NAAQS for GHGs and designates areas as nonattainment.

f. Coordinating Timing of PSD Streamlining With GHG Regulation Under the Act

Regardless of how EPA might tailor the NSR program for GHGs, the timing of these approaches must be coordinated with other GHG actions under the CAA. As described above, the applicability of PSD is tied to whether a pollutant is subject to a control program under the Act. EPA strongly believes that we should be prepared the first time we regulate one or more GHGs under any part of the CAA to explain our approach to permitting, including full consideration of the ideas presented above for responding to the PSD implementation challenges. Coordination of the timing of tailoring strategies for PSD or nonattainment NSR to match with the effective date of the first GHG regulation is necessary to minimize confusion on the part of sources, permitting authorities, and the public, to provide for as effective a transition as possible, and to ensure that the strategies intended to avoid problems can be in place in time to prevent those problems. We seek comment on timing issues in general, and particularly on the coordination of the timing of permitting requirements with the timing of GHG regulation under other parts of the Act.

F. Title V Operating Permits Program

1. What Are the Clean Air Act Requirements Describing the Operating Permits Program?

The Title V operating permits program was enacted in 1990 to improve sources' compliance with the requirements of the CAA.[282] In summary, it provides for facility operating permits that consolidate all Act requirements into a single document, provides for review of these documents by EPA, States, and the public, and requires permit holders to track, report, and certify annually to their compliance status with respect to their permit requirements. Through these measures, it is more likely that compliance status will be known, any noncompliance will be discovered and corrected, and emissions reductions will result. Title V generally does not add new substantive requirements for pollution control, but it does require that each permit contain all a facility's ''applicable requirements'' under the Act, and that certain procedural requirements be followed, especially with respect to compliance with these requirements. ''Applicable requirements'' for Title V purposes generally include all stationary source requirements, but mobile source requirements are excluded.

Presently there are generally not any applicable requirements for control of GHGs that would be included in Title V permits, but regulation of GHGs under any of the approaches described above, including PSD, could give rise to applicable requirements that would be included. Even if a particular source emitting 100 tpy of a GHG is not subject to GHG regulations that are ''applicable requirements,'' under a literal reading of Title V, the Title V permit for that source must include any other applicable requirements for other pollutants. For example, while a 100 tpy CO_2 source would usually have relatively small criteria pollutant emissions that would not by themselves have subjected the source to title V, once subjected to title V for CO_2 emissions, the source would then need to include any SIP rules (e.g., generally applicable opacity limitations that exist in several SIPs) that apply to the source.

When a source becomes subject to Title V, it must apply for a permit within one year of the date it became subject.[283] The application must include identifying information, description of emissions and other information necessary to determine applicability of CAA requirements, identification and certification of the source's compliance status with these requirements (including a schedule to come into compliance for any requirements for which the source is currently out of compliance), a statement of the methods for determining compliance, and other information. The permitting authority then uses this information to issue the source a permit to operate, as appropriate. A Title V source may not operate without a permit, except that if it has submitted a complete application, it can operate under an ''application shield'' while awaiting issuance of its permit.

Title V permits must contain the following main elements: (1) Emissions standards to assure compliance with all applicable requirements; (2) a duration of no more than 5 years, after which the permit must be renewed; (3) monitoring, recordkeeping, and reporting requirements necessary to assure compliance, including a semiannual report of all required monitoring and a prompt report of each deviation from a permit term; (4) provisions for payment of permit fees as established by the permitting authority such that total fees collected are adequate to cover the costs of running the program; and (5) a requirement for an annual compliance certification by a responsible official at the source. An additional specific monitoring requirement, compliance assurance monitoring (CAM), also applies to some emissions units operating at major sources with Title V permits.[284] The CAM rule requires source owners to design and conduct monitoring of the operation of add-on control devices used to control emissions from moderately large emissions units. Source owners use the monitoring data to evaluate, verify, and certify the compliance status for applicable emissions limits.[285] The CAM rule is implemented in conjunction with the schedule of the operating permits program.

While these are the main elements relevant to a discussion of GHGs, there are numerous other permit content requirements and optional elements, as set forth in the Title V implementing regulations at 40 CFR 70.6. One of these

[282] The operating permits program requirements are contained in title V of the CAA, and are codified in EPA regulations at 40 CFR parts 70 and 71.

[283] The deadline may be earlier if the permitting authority (usually an approved state or local air pollution control agency, but in some cases the EPA) sets an earlier date.

[284] Specifically, CAM applies to units with add-on control devices whose pre-control emissions exceed the applicable major source threshold for the regulated pollutant.

[285] CAM requirements are codified in 40 CFR part 64.

optional elements is of particular interest when considering the implications of GHG permitting: The provisions for general permits, which, as discussed in more detail below, can allow for more streamlined permitting of numerous similar sources.

In addition to the permit content requirements, there are procedural requirements that the permitting authority must follow in issuing Title V permits, including (1) determining and notifying the applicant that its application is complete; (2) public notice and a 30-day public comment period on the draft permit, as well as the opportunity for a public hearing; (3) notice to EPA and affected states, and (4) preparing and providing to anyone who requests it a statement of the legal and factual basis of the draft permit. The permitting authority must take final action on permit applications within 18 months of receipt. EPA also has 45 days from receipt of a proposed permit to object to its issuance, and citizens have 60 days to petition EPA to object. Permits may also need to be revised or reopened if new requirements come into effect or if the source makes changes that conflict with, or necessitate changes to, the current permit. Permit revisions and reopenings follow procedural requirements which vary depending on the nature of the necessary changes to the permit.

2. What Sources Would Be Affected If GHGs Were Regulated Under Title V?

Title V requires permitting for several types of sources subject to CAA requirements including all sources that are required to have PSD permits. However, it also applies to all sources that emit or have the potential to emit 100 tpy of an air pollutant.[286] As discussed above for the PSD program, the addition of GHG sources to the program would trigger permitting requirements for numerous sources that are not currently subject to Title V because their emissions of other pollutants are too small. The Title V cutoff would bring in even more sources than PSD because the 100 tpy (rather than 250 tpy) cutoff applies to all source categories, not just the ones specified in the Act's PSD provisions.

Using available data, which we acknowledge are limited, and engineering judgment in a manner similar to what was done for PSD, EPA estimates that more than 550,000 additional sources would require Title V permits, as compared to the current universe of about 15,000–16,000 Title V sources. If actually implemented, this would be more than a tenfold increase, and many of the newly subject sources would be in categories not traditionally regulated by Title V, such as large residential and commercial buildings. However, as described below, EPA believes that, if appropriate, there may be grounds to exclude most of these sources from Title V coverage, either temporarily or permanently, under legal theories similar to those for PSD.

The CAM requirement also applies to major sources that require Title V permits, meaning that a number of smaller sources are potentially newly subject to CAM as well. Under the current CAM requirements, applicability is limited to the monitoring of add-on control devices (e.g., scrubbers, ESPs). Presently there are few known add-on control devices for CO_2, and for many smaller sources, it is unlikely that there will be cost effective add-on controls for CO_2 for many years. Thus, we generally expect source owners to comply with any applicable GHG limits through the use of improved energy efficiency and other process operational changes rather than the use of add-on emissions reduction devices. As a result, even with the large number of sources that will exceed the applicability cutoffs, the CAM rule will have very limited application for sources subject to GHG rules. We ask for comment on this assessment of CAM applicability, and whether there may be CAM impacts that we have not described here.

As an additional note, if GHGs were regulated under section 112 authority, Title V could apply at an even smaller threshold. This consideration adds to the list of difficulties with using section 112 to regulate GHGs that were identified in section VII.C. Although HAPs are excluded from the definition of ''regulated NSR pollutant,'' Title V explicitly includes major sources as defined in section 112 on the list of sources required to obtain an operating permit. While minor sources of HAP can be excluded by rule, major sources of HAP cannot. For HAPs, the major source cutoffs are (as noted previously) 25 tons for any combination of HAPs, and 10 tons for any single HAP. Thus, if GHGs were regulated as HAPs, a 10 ton CO_2 source would require an operating permit under Title V. Under this approach, the number of new Title V sources would easily number in the millions absent a means to limit PTE. In addition the major source definition under section 112 does not exclude fugitive emissions, as it does under PSD for unlisted categories. Thus, if GHGs were designated as HAPs, an uncertain number of additional new kinds of sources (e.g., agriculture, mining), would become newly subject to Title V due to fugitive emissions of GHGs. We ask for comment on whether there are factors EPA should consider in its description of the universe of potentially affected sources.

3. What Are the Key Milestones and Implementation Timeline if Title V Were Applicable for GHGs?

Under an interpretation of the Act parallel to that for PSD, Title V would become applicable for GHGs as soon as GHGs become subject to any actual control requirement. This timing is perhaps even more important for Title V than for PSD because of the potential for an extremely large number of new sources (unless EPA administratively reduced coverage) combined with the fact that Title V applications would all be due at the same time (unless a phase-in approach were adopted). This is because Title V requires permit applications within one year of a source becoming subject to the program, in contrast to the PSD program, where permitting authorities would receive applications over time as sources construct or modify.

Permitting authorities generally must act on Title V applications within 18 months. However, Congress addressed the burden imposed by the initial influx of (what turned out to be less than 20,000) initial Title V permits when it enacted Title V in 1990 by providing for a 3-year phased permit issuance timeline. Although the initial phase-in period is over, we discuss below the possibility of interpreting Title V provisions to authorize a phase-in period for GHG sources becoming newly subject to Title V as well. We ask for comment on whether there are factors EPA should consider in its description of these timelines.

4. What Are Possible Cost and Emission Impacts of Title V for GHGs?

Title V generally does not impose additional applicable requirements on a source. However, sources, permitting authorities, EPA, and the public (to the extent that they participate in the permitting process) all may incur administrative burden due to numerous activities associated with applying for, reviewing, commenting on, and complying with Title V permits. There are significant challenges that would arise if GHG sources become subject to Title V. The sheer volume of new permits would heavily strain the

[286] Other sources required to obtain Title V permits are ''affected sources'' under the acid rain program, and sources subject to NSPS or MACT standards (though non-major sources under these programs can be exempted by rule). It does not apply to mobile sources.

resources of state and local Title V programs. These programs may have to tailor their fee requirements or other program elements to address the strain caused by the influx of numerous smaller sources, even if the permits for each individual source are relatively straightforward. Many new types of sources would need to understand and comply with a new and unfamiliar program. Even under streamlined approaches like general permits (discussed below), there would be administrative burden imposed as sources would have to determine whether they are covered and, if so, would need to submit annual reports and certifications. EPA would see additional burden as well, both because we are the permitting authority in some areas and because we would probably see an increase in the number of Title V petitions. Because Title V does not create new applicable requirements, the new costs of Title V would be mainly attributable to administrative burden. Nonetheless, this overall administrative burden is likely to be unreasonable unless EPA reduces the number of covered sources as discussed below.

Title V of the CAA also contains a self-funding mechanism requiring that permitting authorities collect permit fees adequate to support the costs of running a Title V program. Title V fees must be used solely to run the permit program. For GHGs, the possibility of a huge influx of smaller sources raises questions about how permitting authorities should adjust their fee schedules to ensure that they have adequate resources to permit these sources without causing undue financial hardship to the sources. The most common approach, a cost per ton fee that is equal for all pollutants, would likely result in excessive costs to GHG-emitting sources because of the large mass emissions of GHGs compared to other pollutants. This is particularly true for the universe of small sources brought into Title V solely for their GHG emissions, because those permits are expected to be relatively simple and may even be addressed through general permits (which would not require as many resources or as high a fee). Although it may be permissible for permitting authorities to adopt lower fees specifically for GHGs, they would have to assess the new resources needed for permitting these sources and determine some basis for an appropriate fee and a workable mechanism for collecting it.

As noted above, the benefits of Title V stem primarily from the way its various provisions contribute to improved compliance with CAA requirements. However, for the particular sources that would be added to the program solely due to their GHG emissions, it is unclear whether there would be much benefit from these provisions given the small size of most of these new sources, the uniform design and operation of many of their emissions points, the anticipated lack of add-on control devices, and the relatively small number of applicable requirements that would be included in the permit. We ask for comment on the expected overall costs and benefits of running a Title V program for small GHG sources and for larger GHG sources (*e.g.*, those emitting more than 10,000 tons per year).

5. What Possible Implications Would Use of This Authority for GHGs Have for Other CAA Programs?

Because Title V is designed to work in concert with other CAA requirements and is self-funding, we have not identified any impacts it would have on other programs.

6. What Are Possible Tailoring Approaches To Address Administrative Concerns for Title V for GHGs?

As we did in section VII.D regarding NSR, we present here for comment some possible tailoring options to address concerns about implementing Title V for GHGs. As was previously noted for NSR, we must consider how the Act's language may constrain these options. Nonetheless, we see at least two possible legal theories for reducing administrative concerns through limiting the scope of coverage of Title V that would otherwise result from regulating GHGs. First, case law indicates that in rare cases, the courts will interpret or apply statutory provisions in a manner other than what is indicated by their plain meaning. Courts will do so when Congress's intent differs from the plain meaning, as indicated by other statutory provisions, legislative history, or the absurd, futile, strange, or indeterminate results produced by literal application. Second, the administrative burden of literal application of the Title V provisions may also provide a basis for EPA, based on the judicial doctrine of administrative necessity, to craft relief in the form of narrowed source coverage, exemptions, streamlined approaches or procedures, or a delay of deadlines. Some specific options are discussed in the remainder of this section, and we invite comment on these and other suggested approaches.

a. Potential for Higher Major Source Cutoffs

As discussed above in section VII.A.5, Title V applies to several types of sources under the Act, including, among others, all PSD sources, as well as 100 tpy sources that are not subject to PSD. In section VII.D, we described the reasons why a higher major source cutoff for PSD might make sense to improve the effectiveness of the program by focusing resources away from numerous small sources for which the environmental benefits gained from permitting may not justify the associated administrative burdens. We believe such an approach might be even more important for Title V because many small sources that could become subject to the program solely because of their GHG emissions may have few or no applicable requirements. Unless GHG emissions from these small sources are regulated elsewhere under the Act, the only GHG-related applicable requirements for these sources would come from PSD permitting. Thus, if EPA adopts a higher major source size for PSD, it would arguably be incongruous to require 100 tpy GHG sources to obtain permits under Title V. In that case, adopting a higher applicability threshold for GHGs under Title V in parallel with, and at the same level as for PSD, would make even more sense. Similarly, if EPA were to regulate GHGs for certain source categories under CAA section 111 or 112, and were to include size cutoffs in those regulations, then it could make sense for the size-cutoffs for Title V purposes to reflect the cutoffs for those source categories under those regulations. Indeed, it could make sense to apply Title V only to those sources of GHGs that are themselves subject to regulation for GHG emissions.

We have found several indications of congressional intent that could serve as a basis for interpreting the Title V applicability provisions to implement the above-described size-cutoffs or other limitations, instead of interpreting them literally. First, other provisions in Title V and the legislative history indicate that the purpose of Title V is to promote compliance and facilitate enforcement by gathering into one document the requirements that apply to a particular source. *See* section 504(a) (each Title V permit must contain terms ''necessary to assure compliance with applicable requirements'' of the CAA), H.R. Rep. No. 101–490, at 351 (1990) (''It should be emphasized that the operating permit to be issued under this title is intended by the Administration to be the single document or source of all of the requirements under the Act applicable to the source.''). Limiting the applicability of Title V to sources that emit GHGs in the same quantity as sources that would be subject to GHG limits under PSD (or other CAA requirements) for GHGs—and excluding sources that emit GHGs in lower quantities and therefore are not subject to CAA requirements for GHGs—would be consistent with that purpose. Second, the legislative history of Title V indicates that Congress expected the provisions to apply to a much smaller set of sources than would become subject at 100 tpy GHG levels. *See* S. Rep. 101–228, at 353 (''[T]he additional workload in managing the air pollution permit system is estimated to be roughly comparable to the burden that States and EPA have successfully managed under the Clean Water Act[,]'' under which ''some 70,000 sources receive permits, including more than 16,000 major sources'').

We ask for comment on whether we should consider higher GHG applicability cutoffs for Title V, what the appropriate cutoffs might be, and whether there are additional policy reasons and legal justifications for doing so or concerns about such an approach.

b. Potential for Phase-In of Title V Requirements

Due to the severe administrative burden that would result if hundreds of thousands of sources were all to become subject to Title V at the same time, as could be the case if EPA regulates GHGs elsewhere under the Act, and because many of the sources could become subject before the development of any stationary source controls for GHGs, it may make sense to defer Title V applicability for GHG sources that are subject to Title V solely due to GHG emissions. One deferral approach would be to defer Title V for such sources until such time as they become subject to applicable requirements for GHGs. Alternatively, it may make sense to phase in Title V applicability with the largest sources applying soonest, similar to what was discussed above for PSD permitting.

Legal support for some type of deferral may be found in the case law, described above, that identifies deferral as one of the tools in the ''administrative necessity'' toolbox. In the case of Title V, deferral may find further legal support by reference to provisions of Title V itself: Congress addressed the burden imposed by the initial influx of tens of thousands of Title V permits when it originally enacted Title V in 1990 by providing for a 3-year phased permit issuance timeline.[287] A similar phased approach may have even greater merit here due to the even greater number of permits. We ask for comment on the legal and policy arguments for or against a phase-in approach, and request suggestions for workable permit application and issuance timelines for Title V permits for small GHG sources.

c. General Permits

The use of general permits is an additional option for addressing the potentially large numbers of GHG sources that could become subject to Title V. While general permits would not completely eliminate the resource burden, and may not work for every type of source, they clearly offer an option for meeting the Title V requirements in a more efficient way. Congress expressly provided for general permits for Title V and many states have experience issuing them. They appear to be a good fit for the numerous similar small sources we are primarily concerned about. Nonetheless, we still expect that the sheer volume of sources and number of different types of sources affected will present challenges. Further, any Title V general permit must comply with all requirements applicable to permits under Title V, and no source covered by a general permit may be relieved from the obligation to file a permit application under section 503 of the Act. We seek comment on whether source characteristics and applicable requirements are similar enough for a general permit approach to be helpful, for what categories it would provide the greatest benefit, and the degree to which it would or would not ease the expected difficulties with implementing a GHG Title V program.

d. Fees

Title V contains a self-funding mechanism requiring that permitting authorities collect permit fees adequate to support the costs of running a Title V program. Title V fees must be used solely to run the permit program. For GHGs, the possibility of a huge influx of new sources raises questions about how permitting authorities should adjust their fee schedules to ensure that they have adequate resources to permit these sources. Title V provides significant flexibility to permitting authorities in setting their fee schedules so long as they can demonstrate that fees are adequate to cover all reasonable costs required to develop and administer the Title V program requirements.[288] The additional resource burden imposed by GHG sources will depend heavily on what approaches EPA and states ultimately adopt for tailoring the program for these sources, but EPA does expect that some additional resources will be necessary under virtually any scenario.

Most states charge Title V fees on a dollar/ton basis, and actual amounts vary from state to state. For 2008, EPA charges $43.40 per ton, but only for regulated pollutants for the fee calculation (which generally includes all regulated pollutants but excludes carbon monoxide and some other pollutants). Because of the large mass emissions of GHGs and especially of CO_2 compared to other pollutants, if EPA and states charge fees for GHG emissions based on cost/ton numbers for criteria pollutants or HAPs, we expect that the fee revenues would be grossly excessive for what is needed to process permits for GHG sources. This is particularly true for the universe of small sources brought into Title V solely for their GHG emissions because those permits are expected to be relatively simple and may be addressed through general permits. Therefore we believe that it is appropriate for permitting authorities to consider other available options for covering their GHG source permitting costs, including: substantially lower cost per ton fees for GHGs, fixed fees (e.g., one time or annual processing fee that is the same for all applicants below a certain size), and/or charging no fees for smaller GHG sources. We ask for comment on these and other suggestions for permitting authorities to use on structuring their fee provisions. We also request comment on the expected resource burden resulting from new GHG permitting, and how EPA should determine the adequacy of fees. EPA rules contain an optional method for permitting authorities to use in calculating a presumptively adequate fee. These regulations do not include GHGs as a regulated pollutant for this calculation but could in the future if GHGs were regulated under certain parts of the Act. For permitting authorities that still use this presumptive calculation, we ask for comment on whether, for the reasons described above, EPA should specifically exclude GHGs from this calculation or address it in a different manner. Finally, because EPA itself is the permitting authority for some sources, we are also interested in comments on whether and how EPA should change its fee structure in its part 71 permitting regulations to meet

[287] CAA section 503(c).

[288] See CAA section 502(b)(3), which also lists specific activities whose costs must be covered.

its own increased resource needs from GHG permitting.[289]

e. Coordinating Timing With Other Actions

Like PSD, the timing of any approach to streamline Title V must be coordinated with other GHG actions under the CAA. We believe that any EPA determination about the applicability of the Title V program to GHGs should be accompanied by an explanation of how EPA plans to address—and how we recommend that State and local permitting authorities address—the numerous implementation challenges such a determination would pose. This timing is perhaps even more important for Title V than for PSD because of the potential for an extremely large number of new sources and the fact that Title V applications would (unless a phase-in approach is adopted) all be due at the same time, whereas PSD applications would come in over time as sources construct or modify. We seek comment on timing issues in general, and particularly on the coordination of the timing of Title V applicability with the timing of GHG regulation under other parts of the Act.

We specifically request comment on the timing of the applicability of Title V permit requirements in relation to the applicability of GHG control requirements. Consider the scenario where EPA issues a rule regulating GHGs from mobile sources, and then issues a series of rules regulating GHGs from categories of stationary sources. One possible interpretation of the Act and EPA's regulations is that the mobile source rule would trigger the applicability of Title V, at which point the hundreds of thousands of 100-ton and above sources would become subject toTtitle V and would have one year to apply for Title V permits. Generally, however, these permits would initially contain no applicable requirements for control of GHGs (mobile source requirements are not included in Title V permits), and would likely contain no applicable requirements for other pollutants, or only some generally applicable SIP rules that apply to sources which had previously not needed Title V permits. We have discussed the challenges of issuing even these minimal permits in such large numbers. However, as EPA proceeded to issue stationary source rules, each permit with three or more years remaining on its term would, under current rules, have to be reopened within 18 months of promulgation of each new rule to incorporate any applicable requirements from the new rule that would apply to the permitee. For permits with less than 3 years remaining, the applicable requirements would be incorporated at permit renewal. This scenario would result in duplicative effort as permitting authorities issued hundreds of thousands of minimal Title V permits with no GHG requirements, followed by a period of numerous reopenings for some GHG source categories, while the requirements for other GHG source categories would remain off-permit until renewal, at which point they would need to be included in the renewal permit. We ask for comment on how best to tailor the options above to minimize duplicative effort and maximize administrative efficiency in light of these timing concerns, and on whether additional options may be needed.

[289] Technically these increased resources would need to be provided to EPA through increased appropriation, as the EPA fee revenues would go to the general treasury.

G. Alternative Designs for Market-Oriented Regulatory Mechanisms for Stationary Sources

EPA believes that market-oriented regulatory approaches merit consideration under section 111 or other CAA authorities for regulating stationary source emissions, along with other forms of regulation. Economic efficiency advantages of market-oriented approaches that have the effect of establishing a price for emissions were discussed in section III. This section discusses four types of market-oriented approaches:

- A cap-and-trade program, which caps total emissions from covered sources, providing certainty regarding their future emission levels, but not their costs.
- A rate-based emission credit program (also called a tradable performance standard), which imposes an average mass-based emission rate across covered sources but does not cap total emissions, so emissions could rise with increased production.
- An emissions fee, which sets a price for emissions but doesn't limit total emissions from covered sources.
- A hybrid approach, which could combine some attributes of a rate-based emissions trading system and some attributes of a tax. A variety of hybrid approaches are possible; the best-known is the combination of a cap-and-trade system with a ''price ceiling.'' With a price ceiling, if the price of allowances exceeds a certain level, the government makes allowances available to the market at the ceiling price.

For a local pollutant, a regulatory approach that provides certainty concerning future emissions can provide a predictable level of protection, within modeling uncertainties. In the GHG context, certainty concerning the amount of emission reduction to be achieved by a U.S. program can make possible an estimated change in predicted warming, but does not provide certainty that the U.S. will achieve a desired level of climate protection. This is because GHGs are global pollutants and the level of climate protection provided depends on the actions of other countries as well as the U.S.

There is a robust debate about the respective merits of policies that provide price certainty, but not emissions certainty, and policies that provide emissions certainty, but not price certainty. A variety of cost-containment mechanisms have been proposed for GHG cap-and-trade systems; these mechanisms offer different tradeoffs between emissions certainty and price certainty.

EPA requests comment on the extent to which CAA legal authorities would accommodate each of these regulatory approaches. In the section 111 context, we note that these market-oriented approaches could be used in lieu of, or in addition to, other options including emission rate standards, technology-based standards, or work practices. With respect to section 111, EPA recognizes that these market-oriented approaches may differ in significant ways from the manner in which we have historically designed emission standards and required compliance with those standards. For this reason, we request comment on the extent to which each of these approaches could meet the statutory definition of a ''standard of performance'' and on what additional criteria or conditions could be considered to ensure that they do so. We also seek comment on how these options compare based on the policy design considerations listed in section III.F.1, including effectiveness of risk reduction, certainty and transparency of results, economic efficiency, incentives for technology development, and enforceability.

1. Emissions Cap-and-Trade

A cap-and-trade system limits GHG emissions by placing a cap on aggregate emissions from covered sources. Authorizations to emit, known as emissions allowances, are distributed to companies or other entities consistent with the level of the cap. Each allowance gives the holder an authorization to emit a fixed amount of emissions (e.g., one ton) during a given compliance period. At the close of the compliance period, sources must surrender allowances equal to their emissions during that period. Such a system does not impose limits on emissions from individual sources; rather, it caps emissions across a group of sources (e.g., an industry sector) and allows entities to buy and sell those allowances with few restrictions. Key features of a well-designed cap-and-trade program include accurate tracking and reporting of all emissions, compliance flexibility, and certainty (provided by the cap) in achieving emission reductions. While the cap provides certainty in future emissions, cap-and-trade does not provide certainty of the price, which is determined by the market (price uncertainty diminishes as certainty regarding control costs increases).

EPA has previously authorized emissions trading under section 111. For instance, EPA promulgated standards of performance for new and existing electric utility steam generating units on May 18, 2005 (70 FR 28606), establishing a mercury emissions cap-and-trade program for coal-fired electric generating units that states could use to meet their section 111 obligations to control mercury for coal-fired electric generating units. While the court subsequently vacated this action, the ruling did not address the legality of trading under section 111.

If EPA designed a cap-and-trade program that could cover certain source categories covered by section 111, such a program could be modeled after similar trading programs the Agency has developed under sections 110 and 111 of the Act, such as the NO_X Budget Trading Program, the Clean Air Interstate Rule NO_X and SO_2 Trading Programs, and the Clean Air Mercury Rule Trading Program. Under this model, EPA would establish appropriate state GHG emissions budgets covering emissions of GHG for each covered source category. EPA would establish consistent rules related to subjects such as monitoring, applicability and timing of allocations that states would be required to meet. EPA would develop and administer a GHG allowance tracking system, similar to tracking systems the Agency administers for SO_2, and NO_X. EPA would determine provisions for monitoring, reporting, and enforcement. If states promulgated rules consistent with the requirements set forth by EPA, sources in their State could participate in the trading program. Alternatively, states could develop alternative regulatory mechanisms to meet the emissions budgets.

A key component of an emissions cap-and-trade program is the ability to accurately monitor emissions.[290] For many, but possibly not all, large stationary sources, there are methods to monitor CO_2 that may provide enough accuracy for a cap-and-trade program. Most large utility boilers are already required to monitor and report CO_2 emissions under the Acid Rain Program. Utility and industrial boilers are well suited to cap-and-trade; many participate in SO_2 and NO_X trading under the Acid Rain and NO_X SIP Call programs. At refineries, some emission sources could be well suited to cap-and-trade, while for others, accurate monitoring methods or other ways to track and verify emissions may not be available. More analysis is needed to determine availability of monitoring methods for all refinery emission sources. The cement industry is another that may be well suited to emissions cap-and-trade, since monitoring is available and a number of facilities currently participate in NO_X trading under the NO_X SIP Call. Cap-and-trade may not be an appropriate mechanism for the landfills, except for potential use of landfill gas projects for offsets. The quantity of landfill methane captured and combusted (*i.e.,* the emission reduction) can be measured directly; however, total emissions are difficult to measure.

We request comments generally on the use of cap-and-trade programs for GHGs under section 111 and other CAA authorities, including design elements such as opportunities for sources to opt into such programs, inter-sector trading and offsets, allowance auctions, cost containment mechanisms, and conditions or safeguards to ensure that emission reduction goals are met and that local air quality is protected. Particular issues to consider include whether it be allowable under section 111 to develop a cap-and-trade program that covered multiple source categories or would each source category have to be covered under a source-category-specific cap-and-trade program. Another issue is whether it would be legally permissible to allow offsets (*i.e.*, obtaining emission reductions from sources outside of the capped sector) to meet the requirements of section 111.

[290] While monitoring is important for determining compli,ance in all regulatory emission reduction approaches, in a cap-and-trade system monitoring is also important for functioning of the allowance market.

2. Rate-Based Emissions Credit Program

A rate-based emissions credit program—also called a tradable credit standard or intensity target program—is an emissions trading mechanism. Unlike cap-and-trade, however, a rate-based credit program does not impose a cap on aggregate emissions from covered sources. Rather, a rate-based emissions credit program establishes a regulatory standard based on emissions intensity (*e.g.*, emissions per unit of input, emissions per unit of product produced, emissions per revenue/value-added generated). To the extent that a covered source has an emission rate below the regulatory intensity standard, the source generates credits that it can sell to sources with emission rates higher than the regulatory intensity standard. The price of credits would be determined by the market.[291] The regulatory intensity standard might be set below the recent average intensity for a given industry.[292] Once in place, the standard would determine the average emissions intensity (or rate) of the regulated industry.

Like a cap-and-trade approach, a rate-based trading approach can reduce the cost of reducing emissions from a group of sources, relative to the cost of requiring every source to reach the same emission rate. A drawback of the rate-based approach is that it provides an incentive to increase whatever is used in the denominator of the rate (*e.g.*, the output of a good or the amount of a particular input). Therefore, rate-based policies can encourage increased production because production can be rewarded with additional credits. This in turn has the potential to encourage increased emissions and thus to raise the overall cost of achieving a given level of emissions.

Many of the considerations described above for cap-and-trade program design

[291] Credits are generated by a source with emissions below the regulatory intensity (or rate). Credits are measured in a fixed unit of emissions, *e.g.*, a ton. A source that emits at an intensity higher than the regulatory intensity must surrender credits—purchased from a source with emissions below the regulatory intensity or other entity holding credits—equivalent to the difference between their actual emissions and the allowable emissions.

[292] The average intensity could be set using any of a number of metrics and baselines. For example, the metric might be tons of CO_2 emitted per ton of cement produced. The baseline year for calculating average intensity might be the same as the compliance year, *i.e.,* after the close of the compliance year, the average tons CO_2 emitted per ton of cement produced would be calculated across the industry and a source that produced with emissions above the average would need to buy credits while a source that produced with emissions below the average could sell credits. Alternatively, the average intensity could be based on a year prior to the initial compliance year.

would also apply to design of a rate-based credit program. Measuring outputs to determine the regulatory intensity may present some difficulty. In particular, determining the intensity for facilities that generate multiple products would be challenging. Sectors that use multiple inputs (*e.g.*, different fuels) might require use of a common metric (*e.g.*, Btu combusted) to support a rate-based approach based on inputs.

Rate-based trading programs are most easily applied in a specific sector where facilities have similar emissions characteristics. For utility and industrial boilers, a rate-based credit standard could be established for GHG emissions. For refineries, rate-based credit standards could be established for individual processes or equipment but would be difficult to set at the facility level. A GHG emissions rate-based tradable credit standard could be developed for the Portland cement industry. This mechanism may not be appropriate for landfills (see discussion of monitoring above).

We request comments on the use of emission rate trading programs under section 111 or other CAA authorities. Similar to cap-and-trade programs, we are seeking comment on whether sector-specific programs or inter-sector programs might be more appropriate. We also request comment on issues related to defining emission rates for facilities producing multiple types of products.

3. Emissions Fee

A GHG fee would limit GHG emissions by placing a price on those emissions. The price is fixed up front (unlike cap-and-trade where the price depends on the market), and a source covered by the tax would pay to the government the fixed price for every ton of GHG that it emits. A GHG fee permits the aggregate amount of emissions to adjust in response to the tax, in contrast to a cap-and-trade system where the quantity of emissions is fixed. Some key features of a GHG fee include accurate tracking and reporting of all emissions from covered sources, compliance flexibility, and certainty in the price of emissions (but not certainty in future emissions because there is no cap). As noted in the cap-and-trade subsection above, the emissions of CO_2 from most large utility boilers are already accurately monitored; this attribute would facilitate application of an emissions tax (as well as facilitating application of a cap-and-trade system).

Depending on the specific authority granted by Congress with respect to the disposition of revenue, the revenue generated by the fee (as with potential auction revenues under a cap-and-trade approach) could theoretically be used for any number of public purposes. Note that depending on how the money was spent, the use of the revenues would have the potential either to reduce or to increase market distortions that reduce economic welfare.

The issue of whether the CAA authorizes emissions fees is discussed above in section III.F.2.

4. Hybrid Market Based Approach

A hybrid, market-oriented approach that could be used to regulate GHG borrows from pollution control options that are based on setting emissions rates, emissions credit trading, and emissions fees. This approach starts with a rate-based emissions credit program in which an average emission rate (*e.g.*, tons of GHGs emitted per unit of output or input) would be established for a given industry. As with a typical rate-based policy, a source in the given industry would need to buy credits to the extent it produces with emissions over the average intensity, and could sell credits to the extent it produces with emissions below the average. An element of an emissions fee approach would then be added to this policy in which the government would also buy and sell credits. The government could set a price for credits based on selected policy criteria, and offer credits to sources at that predetermined price. Sources could then buy credits from the government as well as other regulated sources. Therefore, the government-set price would act as a price ceiling (or ''safety-valve''), and the potential for price fluctuations in emissions credits would be diminished (because the government's predetermined price would act as a ceiling price). As long as relatively cost-effective GHG emissions reductions could occur within a covered sector over time, the average emissions intensity may decline and total reductions in emissions would occur in a relatively cost-effective manner without significant government handling of emissions fee revenues. In addition to being a seller, the government could also act as a buyer (so the government sales of credits would not result in an excess supply). A similar approach without the government's role in selling credits at a ceiling price and with a fixed schedule of allowable average annual rate of allowable emissions was actually successfully used in the phase down of lead in gasoline in the 1980s by EPA.

Some have suggested that the government could set a price for GHG credits or allowances based on its assessment of those benefits to be gained from the GHG emissions reduction per unit of output or input. In theory, under this approach the marginal compliance costs would never exceed the marginal benefits of reducing emissions. Note, however, that there are serious issues to be resolved regarding whether and how a defensible single estimate of marginal GHG reduction benefits can be developed for this purpose (see section III.G). First, whether the scope of benefits counted is global or domestic could significantly affect the marginal benefits estimate. Second, for benefits categories that can be quantified and monetized, there are many uncertainties that result in a range of legitimate estimates, making it difficult to pinpoint an appropriate number. Third, there is a bias toward underestimating benefits of GHG reductions because many impacts categories identified by the IPCC are not quantified and monetized.[293] As a result, the price might be set too low to achieve the amount of emissions reductions that would be warranted considering all benefits and policy goals.

By including this discussion, EPA is not taking a position on whether it has legal authority to pursue a hybrid market-oriented approach. (See section III.F.2 above.) However, the agency seeks comment on the general matter of how the pricing of credits within an emissions intensity approach might be designed and established, what legal authority would be necessary for this action, and what impact different price-setting approaches would have on aggregate emissions reductions, costs and benefits.

VIII. Stratospheric Ozone Protection Authorities, Background, and Potential Regulation

A. Ozone Depleting Substances and Title VI of the Clean Air Act

Title VI of the CAA provides authority to protect stratospheric ozone, a layer high in the atmosphere that protects the Earth from harmful UVB radiation. Added to the CAA in 1990, Title VI establishes a number of regulatory programs to phase out and otherwise control substances that deplete stratospheric ozone. These ozone-depleting substances (ODS) are used in many consumer and industrial applications, such as refrigeration,

[293] There also are policy considerations that would be neglected by an approach attempting to find a point at which marginal costs equal marginal benefits. Examples include irreversibility of changes in climate with adverse impacts affecting future generations who cannot take part in today's decision-making, and unequal geographic distribution of adverse climate change impacts.

building and vehicle air conditioning, solvent cleaning, civil aviation, foam blowing, and fire extinguishing, and even in small but important uses such as metered dose inhalers.

Many ODS and some of the substances developed to replace them (e.g., HFCs) are also potent GHGs. As described below, Title VI programs have already achieved significant reductions in emissions of ODS and thus in emissions of GHGs. However, the ODS being phased out are not among the six major GHGs addressed by this notice. Because these ODS are already being addressed by international and national requirements for protecting stratospheric ozone, they are not covered by UNFCCC requirements, the President's May 2007 directive or many other efforts to address climate change. Similarly, the discussion in this notice of a potential endangerment finding for GHGs does not include in its analysis the ODS being phased out.

In this section of the notice, we briefly describe Title VI regulatory programs as they relate to ODS because of the GHG emission reductions they achieve. We also consider the Title VI program for regulating ODS substitutes, since some substitutes are also GHGs. Since our focus in this notice is on potential use of the CAA to control the six major GHGs, we also examine the general authority in section 615 as it might be used to control those GHGs. However, as further explained below, section 615 would be available for that purpose only to the extent that EPA finds that emissions of the major GHGs are known or reasonably anticipated to cause or contribute to harmful effects on stratospheric ozone or otherwise affect the stratosphere in a way that may reasonably be anticipated to endanger public health or welfare. Unlike other CAA provisions examined in this notice, section 615 would not be triggered by a finding that one or more GHGs cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. The potential applicability of section 615 to the major GHGs depends on whether specified findings related to the stratosphere or ozone in the stratosphere could be made. In this way, Title VI is significantly different from other CAA titles that provide more general regulatory authority to address air pollutants that meet an endangerment test.

1. Title VI Regulatory Programs

Existing Title VI programs are largely focused on reducing and otherwise controlling ODS to protect stratospheric ozone. The cornerstone Title VI program is a graduated phaseout of ODS that implements similar requirements in the Montreal Protocol on Substances that Deplete the Ozone Layer, an international treaty to which the U.S. is a party. The Title VI phaseout program relies on a system of marketable allowances to control overall U.S. consumption (defined as production + imports − exports) consistent with the Protocol's requirements. EPA tracks production, export, and import of ODS, as well as transactions in ODS allowances reflecting the flexibility inherent in the program's market-oriented approach. This ensures compliance with U.S. consumption caps established under the Protocol. The program also allows exemptions from the phaseout to ensure that supplies of ODS critical to certain sectors, like the agricultural fumigant methyl bromide, are available until alternatives adequately penetrate the marketplace.

Other Title VI provisions supplement the phaseout program in a variety of ways that enhance ozone layer protection. Under these provisions, EPA has established a national ODS recycling and emission reduction program, bans on nonessential ODS uses, a program for labeling ODS-containing products, and the Significant New Alternatives Policy (SNAP). Under the SNAP program, EPA reviews and approves substitutes for ODS to help spur the development and uptake of safer alternatives. Finally, Title VI authorizes EPA to accelerate the schedule for phasing out ODS as warranted by scientific information, the availability of substitutes, or the evolution of the treaty's requirements pursuant to international negotiations among Parties to the Montreal Protocol.

Title VI has achieved large reductions in ODS consumption and emissions, and consequently has reduced GHG emissions and slowed climate change. According to a recent study, by 2010 ozone layer protection will have done more to mitigate climate change than the initial reduction target under the Kyoto Protocol, amounting to avoided emissions of 11 billion metric tons of CO_2 equivalent per year, or a delay in climate impacts by about 10 years.[294]

Because some ODS substitutes are GHGs, some have asked whether the net effect of the Protocol on climate has been beneficial. Recent research has demonstrated that the climate impact of ODS (e.g., chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs)), compared to CO_2 emissions from fossil fuel combustion, fell from about 33 percent in 1990 to about 10 percent in 2000. The following graph shows how the shift over time toward ODS alternatives under Title VI has created a marked downward trend for GHG consumption in sectors that use ODS and their substitutes, even while these uses have grown with the U.S. economy and population. As can be seen below, consumption of the ODS (CFCs, HCFCs, etc.) in 2004, although significantly lower than peak ODS emissions in 1990, were actually greater than consumption of HFCs, which are substitutes for CFCs and HCFCs.

In view of the GHG emission reduction benefits of existing Title VI programs, EPA seeks public comment on how elements of the existing Title VI program could be used to provide further climate protection while assuring a successful completion of the ODS phaseout, including a smooth transition to alternatives.

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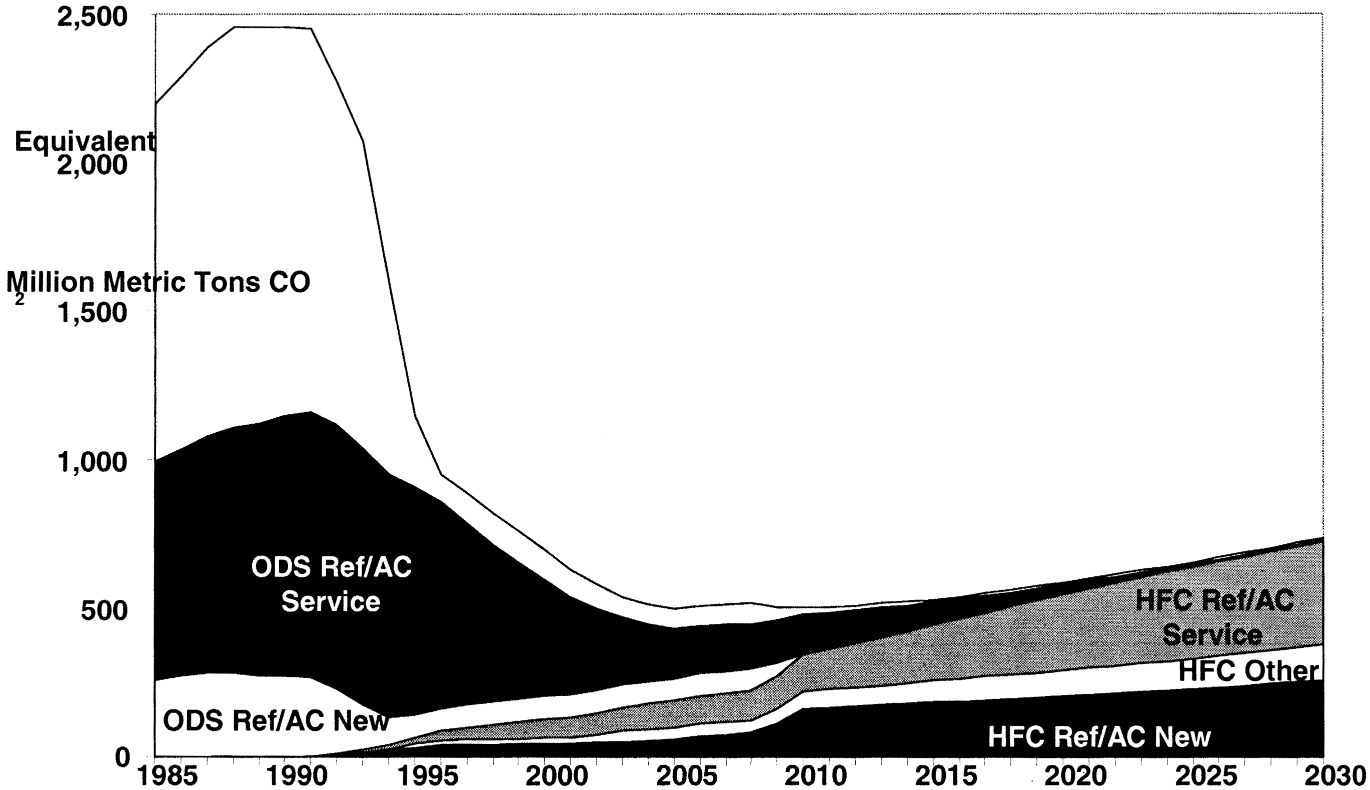
[294] Velders, G.J. et al., *The Importance of the Montreal Protocol in Protecting Climate,* Proceedings of the National Academy of Sciences, March 2007.

Figure VIII-1



2. Further Action Under the Montreal Protocol

The Montreal Protocol has been and will continue to be an important, if limited, step in addressing climate change. At the 19th Meeting of the Parties in September 2007, the Parties agreed to more aggressively phase out a class of ODS, the hydrochlorofluorocarbons (HCFCs). The agreement to adjust the phase-out schedule for HCFCs is expected to reduce emissions of HCFCs to the atmosphere by 47 percent, compared to the prior commitments under the treaty over the 30-year period of 2010 to 2040. For the developing countries, the agreement means there will be about a 58 percent reduction in HCFC emissions over the same period.

The climate benefits of the faster phase-out of HCFCs will depend to some extent on technology choices in the transition from HCFCs. The estimated climate benefit of the new, stronger HCFC phase-out may be approximately 9,000 million metric tons of CO_2e. A byproduct of the manufacture of HCFC–22 is hydrofluorocarbon-23 (HFC–23), a gas that does not damage ozone in the stratosphere but has a very high GWP. Because this gas is produced in higher quantities in lower efficiency production, to the extent that HCFC–22 production in the developing world remains uncontrolled, additional HFC–23 would be created. Thus, the agreement to sharply limit future developing world production of ODS represents an important opportunity for climate protection, as well as ozone layer recovery, as the President recognized in his April 16, 2008 speech on climate change.

B. Title VI Authorities Potentially Applicable to the Major GHGs

As mentioned previously, the framework created by Title VI could be effective in achieving GHG reductions by reducing and controlling ODS and ODS substitutes through existing mechanisms for tracking production, evaluating new safer alternatives, and addressing the needs of the major contributing subsector, refrigeration and air conditioning, through technician training, emission reduction and recycling. In this section we review Title VI provisions that could potentially apply to efforts to reduce the major GHGs that are not also ODS or ODS substitutes.

Title VI mostly includes provisions specific to individual ODS and programs. The provisions generally apply to ''class I'' or ''class II'' ODS. Title VI requires EPA to list specified substances as class I and class II ODS, and authorizes EPA to add other substances to either category if the Agency makes certain findings regarding the substance's effect on stratospheric ozone (see sections 602(a) and (b)). One important difference between class I and class II ODS is that class I substances include the most potent ODS; section 602(a) requires EPA to list as class I substances all substances with an ozone depletion potential of more than 0.2.[295]

Title VI also requires EPA to publish the global warming potential (GWP) of each listed ODS. Section 602(e) further provides that the requirement to publish

[295] The ozone depletion potential (ODP) of a chemical measures its ability to reduce stratospheric ozone compared to a common ODS known as CFC–11. While this and another common ODS have ODPs of 1.0, the ODPs of class I and class II ODSs known to be in use range from 0.02 to 10.

GWP for a listed substance ''shall not be construed to be the basis of any additional regulation under'' the CAA.

Since the major GHGs being addressed in this notice have no ozone depletion potential, it appears that the Title VI provisions that authorize regulation of listed ODS are of limited potential use for regulating those GHGs. EPA requests comment on the potential applicability of ODS-specific Title VI authorities, and the significance of the section 602(e) language quoted above for regulation of GHGs under Title VI.

1. Section 615

In addition to the specific provisions that authorize regulation of listed ODS and in some cases ODS substitutes, Title VI also includes general authority in section 615 to protect the stratosphere, especially stratospheric ozone. Section 615 states:

> If, in the Administrator's judgment, any substance, practice, process, or activity may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere, and such effect may reasonably be anticipated to endanger public health or welfare, the Administrator shall promptly promulgate regulations respecting the control of such substance, practice, process or activity, and shall submit notice of the proposal and promulgation of such regulation to the Congress.

While Title VI was added to the CAA in 1990, a provision largely identical to section 615 was added to the Act in 1977, soon after concerns about the effects of some substances on the stratosphere were initially raised. In 1988, EPA promulgated regulations implementing the first round of requirements of the Montreal Protocol through a system of tradable allowances under section 157(b) of the CAA as amended in 1977. Section 157(b) was subsequently modified by the 1990 Amendments and became section 615.

Since 1990, EPA has rarely relied on the authority in section 615 to support rulemaking activity, since the activities that the Agency regulates to protect stratospheric ozone have generally been addressed under the more specific Title VI authorities. However, in 1993 EPA did rely on section 615 to promulgate trade restrictions in order to conform EPA regulations to Montreal Protocol provisions on trade with countries that were not Parties to the Protocol. (March 18, 1993, 58 FR 15014, 15039 and December 10, 1993, 58 FR 65018, 65044). These trade restrictions prevented shipments of ODS from the U.S. to countries with no regulatory infrastructure to control their use. Promulgating these restrictions reduced the release of ODS into the atmosphere, thereby reducing harmful effects on public health and welfare. The restrictions also resulted in eliminating the U.S. as a potential market for ODS produced in non-Parties, thereby discouraging shifts of production to non-Parties and limiting the potential for undermining the phaseout.

Section 615 authority remains available when other CAA authorities are not sufficient to address effects on the stratosphere, especially ozone in the stratosphere. For example, in the late 1990s, EPA, the National Aeronautics and Space Administration (NASA), and the Federal Aviation Administration (FAA) considered options for addressing potential ozone depletion resulting from supersonic commercial aircraft. EPA and NASA analyzed the impacts from a theoretical fleet of supersonic commercial aircraft, known as High Speed Civil Transport (HSCT), and in an October 1998 Memorandum of Agreement between the two agencies (signed by Spence M. Armstrong, Associate Administrator for Aeronautics and Space Transportation Technology (NASA) and Robert Perciasepe, Assistant Administrator for Air and Radiation (EPA)) noted the potential to rely on section 615 in conjunction with other regulatory authorities.[296]

While section 615 sets forth the authority and responsibility of the Administrator to address effects on the stratosphere in order to protect public health and welfare, EPA recognizes that this authority was intended to augment other authorities and responsibilities established by Title VI. EPA does not believe this authority is a basis for prohibiting practices, processes, or activities that Congress specifically exempted elsewhere. For example, EPA does not intend to promulgate regulations eliminating the exceptions from the ODS phaseout for essential uses as established by section 604.

For section 615 authority to be used, a two-part endangerment test unique to that section must be met. First, the Administrator must find, in his judgment, that ''a substance, practice, process or activity may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere.'' Second, he must determine that ''such effect may reasonably be anticipated to endanger health or welfare.'' To determine the potential applicability of section 615 to major GHGs, EPA thus would have to consider whether available scientific information supports making the requisite findings.

The effect on the stratosphere of GHG emissions and of climate change generally is a topic of ongoing scientific study.[297] Recent science suggests that feedback mechanisms exist that allow temperatures in the stratosphere and troposphere to be mutually reinforcing or mutually antagonistic depending on a number of factors, including the latitude at which the ozone loss occurs. Further research is underway to better understand these interactions. While it is beyond the scope of this notice to assess and analyze the available scientific information on the effect of GHGs on the stratosphere, EPA requests comment on how evolving science might be relevant to the Agency's potential use of section 615. More specifically, EPA requests comment on how scientific research might help resolve areas of ambiguity in the relationship between GHGs, effects on the stratosphere, and climate change, and how this might help the Administrator make appropriate judgments in applying the two-part test of section 615.

If the requisite endangerment finding is made, the regulatory authority provided by section 615 is broad. While most Title VI authorities are applicable to class I or class II substances or their substitutes, section 615 authorizes regulation of ''any substance, practice, process, or activity'' which EPA finds meets the two-part endangerment test. As noted elsewhere in this notice, depending on the nature of any finding made, section 615 authority may be broad enough to establish a cap-and-trade program for the substance, practice, process or activity covered by the finding, if appropriate. Title VI provisions provide other examples of possible regulatory approaches, such as maximizing recapture and recycling and requiring product labeling. EPA requests comment on possible regulatory approaches under section 615 and how those approaches would be affected by the particular endangerment finding that is a prerequisite to the use of section 615 authority.

2. Section 612

Section 612 is also relevant to today's notice to the extent a GHG may be used as a substitute for an ODS. CAA section 612 provides for the review of alternatives to ODS and the approval of substitutes that do not present a risk more significant than other alternatives that are available. Under that authority, the SNAP program has worked collaboratively for many years with industries, user groups, and other

[297] See, *e.g.*, World Meteorological Organization, Global Ozone Research and Monitoring Project—Report No. 50, Scientific Assessment of Ozone Depletion: 2006, Ch. 5, Climate-Ozone Connections.

stakeholders to create a menu of alternatives that can be substituted for the ODS as they are phased out of production in the U.S.

In recent years, industry partners in the motor vehicle air conditioning (MVAC) sector have urged EPA to identify and approve appropriate new substitutes to allow for the implementation of a world-wide platform that will satisfy the needs of the U.S. market while also meeting new requirements in the European Union, which call for a transition over approximately six years beginning with the 2011 model year into non-ODS alternatives with Global Warming Potentials (GWPs) of less than 150.

To address these concerns, EPA proposed in September 2006 a SNAP rulemaking that provided for the use of CO_2 and HFC–152a in MVACs (71 FR 55140 docket no. EPA–HQ–OAR–2004–0488). In a separate action (INSERT FR CITE), EPA has made final the portion of the rulemaking related to HFC–152a. This substitute meets the EU requirements, while also providing a new avenue for automakers to replace ODS. We believe we should issue guidance on the use of CO_2 as an MVAC alternative in the context of the broader considerations of regulating GHGs set forth in this notice. We have included in the docket cited above a summary of our proposal regarding CO_2 as an alternative from MVACs. This summary reflects our latest thinking on the safe use of CO_2 in those systems.

List of Subjects in 40 CFR Chapter I

Environmental protection, Air pollution control.

Dated: July 11, 2008.

Stephen L. Johnson,

Administrator.

[FR Doc. E8–16432 Filed 7–29–08; 8:45 am]

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Federal Register

Wednesday,
July 30, 2008

Part III

Federal Reserve System

12 CFR Part 226
Truth in Lending; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1305]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; official staff commentary.

SUMMARY: The Board is publishing final rules amending Regulation Z, which implements the Truth in Lending Act and Home Ownership and Equity Protection Act. The goals of the amendments are to protect consumers in the mortgage market from unfair, abusive, or deceptive lending and servicing practices while preserving responsible lending and sustainable homeownership; ensure that advertisements for mortgage loans provide accurate and balanced information and do not contain misleading or deceptive representations; and provide consumers transaction-specific disclosures early enough to use while shopping for a mortgage. The final rule applies four protections to a newly-defined category of higher-priced mortgage loans secured by a consumer's principal dwelling, including a prohibition on lending based on the collateral without regard to consumers' ability to repay their obligations from income, or from other sources besides the collateral. The revisions apply two new protections to mortgage loans secured by a consumer's principal dwelling regardless of loan price, including a prohibition on abusive servicing practices. The Board is also finalizing rules requiring that advertisements provide accurate and balanced information, in a clear and conspicuous manner, about rates, monthly payments, and other loan features. The advertising rules ban several deceptive or misleading advertising practices, including representations that a rate or payment is ''fixed'' when it can change. Finally, the revisions require creditors to provide consumers with transaction-specific mortgage loan disclosures within three business days after application and before they pay any fee except a reasonable fee for reviewing credit history.

DATES: This final rule is effective on October 1, 2009, except for § 226.35(b)(3)) which is effective on April 1, 2010. See part XIII, below, regarding mandatory compliance with § 226.35(b)(3) on mortgages secured by manufactured housing.

FOR FURTHER INFORMATION CONTACT: Kathleen C. Ryan or Dan S. Sokolov, Counsels; Paul Mondor, Senior Attorney; Jamie Z. Goodson, Brent Lattin, Jelena McWilliams, Dana E. Miller, or Nikita M. Pastor, Attorneys; Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452–2412 or (202) 452–3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Summary of Final Rules

On January 9, 2008, the Board published proposed rules that would amend Regulation Z, which implements the Truth in Lending Act (TILA) and the Home Ownership and Equity Protection Act (HOEPA). 73 FR 1672. The Board is publishing final amendments to Regulation Z to establish new regulatory protections for consumers in the residential mortgage market. The goals of the amendments are to protect consumers in the mortgage market from unfair, abusive, or deceptive lending and servicing practices while preserving responsible lending and sustainable homeownership; ensure that advertisements for mortgage loans provide accurate and balanced information and do not contain misleading or deceptive representations; and provide consumers transaction-specific disclosures early enough to use while shopping for mortgage loans.

A. Rules To Prevent Unfairness, Deception, and Abuse

The Board is publishing seven new restrictions or requirements for mortgage lending and servicing intended to protect consumers against unfairness, deception, and abuse while preserving responsible lending and sustainable homeownership. The restrictions are adopted under TILA Section 129(l)(2), which authorizes the Board to prohibit unfair or deceptive practices in connection with mortgage loans, as well as to prohibit abusive practices or practices not in the interest of the borrower in connection with refinancings. 15 U.S.C. 1639(l)(2). Some of the restrictions apply only to higher-priced mortgage loans, while others apply to all mortgage loans secured by a consumer's principal dwelling.

Protections Covering Higher-Priced Mortgage Loans

The Board is finalizing four protections for consumers receiving higher-priced mortgage loans. These loans are defined as consumer-purpose, closed-end loans secured by a consumer's principal dwelling and having an annual percentage rate (APR) that exceeds the average prime offer rates for a comparable transaction published by the Board by at least 1.5 percentage points for first-lien loans, or 3.5 percentage points for subordinate-lien loans. For higher-priced mortgage loans, the final rules:

○ Prohibit creditors from extending credit without regard to a consumer's ability to repay from sources other than the collateral itself;

○ Require creditors to verify income and assets they rely upon to determine repayment ability;

○ Prohibit prepayment penalties except under certain conditions; and

○ Require creditors to establish escrow accounts for taxes and insurance, but permit creditors to allow borrowers to cancel escrows 12 months after loan consummation.

In addition, the final rules prohibit creditors from structuring closed-end mortgage loans as open-end lines of credit for the purpose of evading these rules, which do not apply to open-end lines of credit.

Protections Covering Closed-End Loans Secured by Consumer's Principal Dwelling

In addition, in connection with all consumer-purpose, closed-end loans secured by a consumer's principal dwelling, the Board's rules:

○ Prohibit any creditor or mortgage broker from coercing, influencing, or otherwise encouraging an appraiser to provide a misstated appraisal in connection with a mortgage loan; and

○ Prohibit mortgage servicers from ''pyramiding'' late fees, failing to credit payments as of the date of receipt, or failing to provide loan payoff statements upon request within a reasonable time.

The Board is withdrawing its proposal to require servicers to deliver a fee schedule to consumers upon request; and its proposal to prohibit creditors from paying a mortgage broker more than the consumer had agreed in advance that the broker would receive. The reasons for the withdrawal of these two proposals are discussed in parts X.A and X.C below.

Prospective Application of Final Rule

The final rule is effective on October 1, 2009, or later for the requirement to establish an escrow account for taxes and insurance for higher-priced mortgage loans. Compliance with the rules is not required before the effective dates. Accordingly, nothing in this rule should be construed or interpreted to be a determination that acts or practices restricted or prohibited under this rule are, or are not, unfair or deceptive before the effective date of this rule.

Unfair acts or practices can be addressed through case-by-case enforcement actions against specific institutions, through regulations applying to all institutions, or both. A regulation is prospective and applies to the market as a whole, drawing bright lines that distinguish broad categories of conduct. By contrast, an enforcement action concerns a specific institution's conduct and is based on all of the facts and circumstances surrounding that conduct.[1]

Because broad regulations, such as the rules adopted here, can require large numbers of institutions to make major adjustments to their practices, there could be more harm to consumers than benefit if the rules were effective immediately. If institutions were not provided a reasonable time to make changes to their operations and systems to comply with this rule, they would either incur excessively large expenses, which would be passed on to consumers, or cease engaging in the regulated activity altogether, to the detriment of consumers. And because the Board finds an act or practice unfair only when the harm outweighs the benefits to consumers or to competition, the implementation period preceding the effective date set forth in the final rule is integral to the Board's decision to restrict or prohibit certain acts or practices.

For these reasons, acts or practices occurring before the effective dates of these rules will be judged on the totality of the circumstances under other applicable laws or regulations. Similarly, acts or practices occurring after the rule's effective dates that are not governed by these rules will continue to be judged on the totality of the circumstances under other applicable laws or regulations.

B. Revisions To Improve Mortgage Advertising

Another goal of the final rules is to ensure that mortgage loan advertisements provide accurate and balanced information and do not contain misleading or deceptive representations. Thus the Board's rules require that advertisements for both open-end and closed-end mortgage loans provide accurate and balanced information, in a clear and conspicuous manner, about rates, monthly payments, and other loan features. These rules are adopted under the Board's authorities to: adopt regulations to ensure consumers are informed about and can shop for credit; require that information, including the information required for advertisements for closed-end credit, be disclosed in a clear and conspicuous manner; and regulate advertisements of open-end home-equity plans secured by the consumer's principal dwelling. *See* TILA Section 105(a), 15 U.S.C. 1604(a); TILA Section 122, 15 U.S.C. 1632; TILA Section 144, 15 U.S.C. 1664; TILA Section 147, 15 U.S.C. 1665b.

The Board is also adopting, under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), rules to prohibit the following seven deceptive or misleading practices in advertisements for closed-end mortgage loans:

○ Advertisements that state ''fixed'' rates or payments for loans whose rates or payments can vary without adequately disclosing that the interest rate or payment amounts are ''fixed'' only for a limited period of time, rather than for the full term of the loan;

○ Advertisements that compare an actual or hypothetical rate or payment obligation to the rates or payments that would apply if the consumer obtains the advertised product unless the advertisement states the rates or payments that will apply over the full term of the loan;

○ Advertisements that characterize the products offered as ''government loan programs,'' ''government-supported loans,'' or otherwise endorsed or sponsored by a federal or state government entity even though the advertised products are not government-supported or -sponsored loans;

○ Advertisements, such as solicitation letters, that display the name of the consumer's current mortgage lender, unless the advertisement also prominently discloses that the advertisement is from a mortgage lender not affiliated with the consumer's current lender;

○ Advertisements that make claims of debt elimination if the product advertised would merely replace one debt obligation with another;

○ Advertisements that create a false impression that the mortgage broker or lender is a ''counselor'' for the consumer; and

○ Foreign-language advertisements in which certain information, such as a low introductory ''teaser'' rate, is provided in a foreign language, while required disclosures are provided only in English.

[1] *See* Board and FDIC, CA 04–2, *Unfair Acts or Practices by State-Chartered Banks* (March 11, 2004), available at *http://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/attachment.pdf.*

C. Requirement To Give Consumers Disclosures Early

A third goal of these rules is to provide consumers transaction-specific disclosures early enough to use while shopping for a mortgage loan. The final rule requires creditors to provide transaction-specific mortgage loan disclosures such as the APR and payment schedule for all home-secured, closed-end loans no later than three business days after application, and before the consumer pays any fee except a reasonable fee for the review of the consumer's credit history.

The Board recognizes that these disclosures need to be updated to reflect the increased complexity of mortgage products. In early 2008, the Board began testing current TILA mortgage disclosures and potential revisions to these disclosures through one-on-one interviews with consumers. The Board expects that this testing will identify potential improvements for the Board to propose for public comment in a separate rulemaking.

II. Consumer Protection Concerns in the Subprime Market

A. Recent Problems in the Mortgage Market

Subprime mortgage loans are made to borrowers who are perceived to have high credit risk. These loans' share of total consumer originations, according to one estimate, reached about nine percent in 2001 and doubled to 20 percent by 2005, where it stayed in 2006.[2] The resulting increase in the supply of mortgage credit likely contributed to the rise in the homeownership rate from 64 percent in 1994 to a high of 69 percent in 2005—though about 68 percent now—and expanded consumers' access to the equity in their homes.

Recently, however, some of these benefits have eroded. In the last two years, delinquencies and foreclosure starts among subprime mortgages have increased dramatically and reached exceptionally high levels as house price growth has slowed or prices have declined in some areas. The proportion of all subprime mortgages past-due ninety days or more (''serious delinquency'') was about 18 percent in May 2008, more than triple the mid-2005 level.[3] Adjustable-rate subprime mortgages have performed the worst, reaching a serious delinquency rate of 27 percent in May 2008, five times the mid-2005 level. These mortgages have seen unusually high levels of early payment default, or default after only one or two payments or even no payment at all.

The serious delinquency rate has also risen for loans in alt-A (near prime) securitized pools. According to one source, originations of these loans were 13 percent of consumer mortgage originations in 2006.[4] Alt-A loans are made to borrowers who typically have higher credit scores than subprime borrowers, but the loans pose more risk than prime loans because they involve small down payments or reduced income documentation, or the terms of the loan are nontraditional and may increase risk. The rate of serious delinquency for these loans has risen to over 8 percent (as of April 2008) from less than 2 percent only a year earlier. In contrast, 1.5 percent of loans in the prime-mortgage sector were seriously delinquent as of April 2008.

The consequences of default are severe for homeowners, who face the possibility of foreclosure, the loss of accumulated home equity, higher rates for other credit transactions, and reduced access to credit. When foreclosures are clustered, they can injure entire communities by reducing property values in surrounding areas. Higher delinquencies are in fact showing through to foreclosures. Lenders initiated over 550,000 foreclosures in the first quarter of 2008, about half of them on subprime mortgages. This was significantly higher than the quarterly average of 325,000 in the first half of the year, and nearly twice the quarterly average of 225,000 for the past six years.[5]

Rising delinquencies have been caused largely by a combination of a decline in house price appreciation—and in some areas slower economic growth—and a loosening of underwriting standards, particularly in the subprime sector. The loosening of underwriting standards is discussed in more detail in part II.B. The next section discusses underlying market imperfections that facilitated this loosening and made it difficult for consumers to avoid injury.

B. Market Imperfections That Can Facilitate Abusive and Unaffordable Loans

The recent sharp increase in serious delinquencies has highlighted the roles that structural elements of the subprime mortgage market may play in increasing the likelihood of injury to consumers who find themselves in that market. Limitations on price and product transparency in the subprime market—often compounded by misleading or inaccurate advertising—may make it harder for consumers to protect themselves from abusive or unaffordable loans, even with the best disclosures. The injuries consumers in the subprime market may suffer as a result are magnified when originators' incentives to carefully assess consumers' repayment ability grow weaker, as can happen when originators sell their loans to be securitized.[6] The fragmentation of the originator market can further exacerbate the problem by making it more difficult for investors to monitor originators and for regulators to protect consumers.

Limited Transparency and Limits of Disclosure

Limited transparency in the subprime market increases the risk that borrowers in that market will receive unaffordable or abusive loans. The transparency of the subprime market to consumers is limited in several respects. First, price information for the subprime market is not widely and readily available to consumers. A consumer reading a newspaper, telephoning brokers or lenders, or searching the Internet can easily obtain current prime interest rate quotes for free. In contrast, subprime rates, which can vary significantly based on the individual borrower's risk profile, are not broadly advertised and are usually obtainable only after application and paying a fee. Subprime rate quotes may not even be reliable if the originator engages in a ''bait and switch'' strategy. Price opacity is exacerbated because the subprime consumer often does not know her own credit score. Even if she knows her score, the prevailing interest rate for someone with that score and other credit risk characteristics is not generally publicly available.

Second, products in the subprime market tend to be complex, both relative to the prime market and in absolute terms, as well as less standardized than in the prime market.[7] As discussed

[2] Inside Mortgage Finance Publications, Inc., *The 2007 Mortgage Market Statistical Annual* vol. I (*IMF 2007 Mortgage Market*), at 4.

[3] Delinquency rates calculated from data from First American LoanPerformance.

[4] *IMF 2007 Mortgage Market* at 4.

[5] Estimates are based on data from Mortgage Bankers' Association's *National Delinquency Survey* (2007) (*MBA Nat'l Delinquency Survey*).

[6] Benjamin J. Keys, Tanmoy K. Mukherjee, Amit Seru and Vikram Vig, *Did Securitization Lead to Lax Screening? Evidence from Suprime Loans* at 22, available at: *http://ssrn.com/abstract=1093137*.

[7] U.S. Dep't of Housing & Urban Development and U.S. Dep't of Treasury, *Recommendations to Curb Predatory Home Mortgage Lending* 17 (2000) (''While predatory lending can occur in the prime market, such practices are for the most part effectively deterred by competition among lenders, greater homogeneity in loan terms and the prime borrowers' greater familiarity with complex

earlier, subprime originations have much more often been ARMs than fixed rate mortgages. ARMs require consumers to make judgments about the future direction of interest rates and translate expected rate changes into changes in their payment amounts. Subprime loans are also far more likely to have prepayment penalties. Because the annual percentage rate (APR) does not reflect the price of the penalty, the consumer must both calculate the size of the penalty from a formula and assess the likelihood of moving or refinancing during the penalty period. In these and other ways, subprime products tend to be complex for consumers.

Third, the roles and incentives of originators are not transparent. One source estimates that 60 percent or more of mortgages originated in the last several years were originated through a mortgage broker, often an independent entity, who takes loan applications from consumers and shops them to depository institutions or other lenders.[8] Anecdotal evidence indicates that consumers in both the prime and subprime markets often believe, in error, that a mortgage broker is obligated to find the consumer the best and most suitable loan terms available. Consumers who rely on brokers often are unaware, however, that a broker's interests may diverge from, and conflict with, their own interests. In particular, consumers are often unaware that a creditor pays a broker more to originate a loan with a rate higher than the rate the consumer qualifies for based on the creditor's underwriting criteria.

Limited shopping. In this environment of limited transparency, consumers—particularly those in the subprime market—may reasonably decide not to shop further among originators or among loan options once an originator has told them they will receive a loan, because further shopping can be very costly. Shopping may require additional applications and application fees, and may delay the consumer's receipt of funds. This delay creates a potentially significant cost for the many subprime borrowers seeking to refinance their obligations to lower their debt payments at least temporarily, to extract equity in the form of cash, or both.[9] In recent years, nearly 90 percent of subprime ARMs used for refinancings were ''cash out.'' [10]

While shopping costs are likely clear, the benefits may not be obvious or may appear minimal. Without easy access to subprime product prices, a consumer may have only a limited idea after working with one originator whether further shopping is likely to produce a better deal. Moreover, consumers in the subprime market have reported in studies that they were turned down by several lenders before being approved.[11] Once approved, these consumers may see little advantage to continuing to shop for better terms if they expect to be turned down by other originators. Further, if a consumer uses a broker believing that the broker is shopping for the consumer for the best deal, the consumer may believe a better deal is not obtainable. An unscrupulous originator may also seek to discourage a consumer from shopping by intentionally understating the cost of an offered loan. For all of these reasons, borrowers in the subprime market may not shop beyond the first approval and may be willing to accept unfavorable terms.[12]

Limited focus. Consumers considering obtaining a typically complex subprime mortgage loan may simplify their decision by focusing on a few attributes of the product or service that seem most important.[13] A consumer may focus on loan attributes that have the most obvious and immediate consequence such as loan amount, down payment, initial monthly payment, initial interest rate, and up-front fees (though up-front fees may be more obscure when added to the loan amount, and ''discount points'' in particular may be difficult for consumers to understand). These consumers, therefore, may not focus on terms that may seem less immediately important to them such as future increases in payment amounts or interest rates, prepayment penalties, and negative amortization. They are also not likely to focus on underwriting practices such as income verification, and on features such as escrows for future tax and insurance obligations.[14] Consumers who do not fully understand such terms and features, however, are less able to appreciate their risks, which can be significant. For example, the payment may increase sharply and a prepayment penalty may hinder the consumer from

financial transactions.''); Howard Lax, Michael Manti, Paul Raca and Peter Zorn, *Subprime Lending: An Investigation of Economic Efficiency,* 15 Housing Policy Debate 533, 570 (2004) (*Subprime Lending Investigation*) (stating that the subprime market lacks the ''overall standardization of products, underwriting, and delivery systems'' that is found in the prime market).

[8] Data reported by Wholesale Access Mortgage Research and Consulting, Inc., available at *http://www.wholesaleaccess.com/*.

[9] *See* Anthony Pennington-Cross & Souphala Chomsisengphet, *Subprime Refinancing: Equity Extraction and Mortgage Termination,* 35 Real Estate Economics 2, 233 (2007) (reporting that 49% of subprime refinance loans involve equity extraction, compared with 26% of prime refinance loans); Marsha J. Courchane, Brian J. Surette, and Peter M. Zorn, *Subprime Borrowers: Mortgage Transitions and Outcomes (Subprime Outcomes)*, 29 J. of Real Estate Economics 4, 368–371 (2004) (discussing survey evidence that borrowers with subprime loans are more likely to have experienced major adverse life events (marital disruption; major medical problem; major spell of unemployment; major decrease of income) and often use refinancing for debt consolidation or home equity extraction); *Subprime Lending Investigation,* at 551–552 (citing survey evidence that borrowers with subprime loans have increased incidence of major medical expenses, major unemployment spells, and major drops in income).

[10] A ''cash out'' transaction is one in which the borrower refinances an existing mortgage, and the new mortgage amount is greater than the existing mortgage amount, to allow the borrower to extract from the home. Figure calculated from First American LoanPerformance data.

[11] James M. Lacko and Janis K. Pappalardo, Federal Trade Commission, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* at 24–26 (2007), available at: *http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf (Improving Mortgage Disclosures)* (reporting evidence based on qualitative consumer interviews); *Subprime Lending Investigation* at 550 (finding based on survey data that ''[p]robably the most significant hurdle overcome by subprime borrowers * * * is just getting approved for a loan for the first time. This impact might well make subprime borrowers more willing to accept less favorable terms as they become uncertain about the possibility of qualifying for a loan at all.'').

[12] *Subprime Outcomes* at 371–372 (reporting survey evidence that relative to prime borrowers, subprime borrowers are less knowledgeable about the mortgage process, search less for the best rates, and feel they have less choice about mortgage terms and conditions); *Subprime Mortgage Investigation* at 554 (''Our focus groups suggested that prime and subprime borrowers use quite different search criteria in looking for a loan. Subprime borrowers search primarily for loan approval and low monthly payments, while prime borrowers focus on getting the lowest available interest rate. These distinctions are quantitatively confirmed by our survey.'').

[13] Jinkook Lee and Jeanne M. Hogarth, *Consumer Information Search for Home Mortgages: Who, What, How Much, and What Else?*, Financial Services Review 291 (2000) (*Consumer Information Search*) (''In all, there are dozens of features and costs disclosed per loan, far in excess of the combination of terms, lenders, and information sources consumers report using when shopping.'').

[14] *Consumer Information Search* at 285 (reporting survey evidence that most consumers compared interest rate or APR, loan type (fixed-rate or ARM), and mandatory up-front fees, but only a quarter considered the costs of optional products such as credit insurance and back-end costs such as late fees). There is evidence that borrowers are not aware of, or do not understand, terms of this nature even after they have obtained a loan. *See Improving Mortgage Disclosures* at 27–30 (discussing anecdotal evidence based on consumer interviews that borrowers were not aware of, did not understand, or misunderstood an important cost or feature of their loans that had substantial impact on the overall cost, the future payments, or the ability to refinance with other lenders); Brian Bucks and Karen Pence, *Do Homeowners Know Their House Values and Mortgage Terms?* 18–22 (Board Fin. and Econ. Discussion Series Working Paper No. 2006–3, 2006) (discussing statistical evidence that borrowers with ARMs underestimate annual as well as life-time caps on the interest rate; the rate of underestimation increases for lower-income and less-educated borrowers), available at *http://www.federalreserve.gov/pubs/feds/2006/200603/200603pap.pdf*.

refinancing to avoid the payment increase. Thus, consumers may unwittingly accept loans that they will have difficulty repaying.

Limits of disclosure. Disclosures describing the multiplicity of features of a complex loan could help some consumers in the subprime market, but may not be sufficient to protect them against unfair loan terms or lending practices. Obtaining widespread consumer understanding of the many potentially significant features of a typical subprime product is a major challenge.[15] If consumers do not have a certain minimum level understanding of the market and products, disclosures for complex and infrequent transactions may not effectively provide that minimum understanding. Moreover, even if all of a loan's features are disclosed clearly to consumers, they may continue to focus on a few features that appear most significant. Alternatively, disclosing all features may ''overload'' consumers and make it more difficult for them to discern which features are most important.

Moreover, consumers may rely more on their originators to explain the disclosures when the transaction is complex; some originators may have incentives to misrepresent the disclosures so as to obscure the transaction's risks to the consumer; and such misrepresentations may be particularly effective if the originator is face-to-face with the consumer.[16] Therefore, while the Board anticipates proposing changes to Regulation Z to improve mortgage loan disclosures, it is unlikely that better disclosures, alone, will address adequately the risk of abusive or unaffordable loans in the subprime market.

Misaligned Incentives and Obstacles to Monitoring

Not only are consumers in the subprime market often unable to protect themselves from abusive or unaffordable loans, originators may at certain times be more likely to extend unaffordable loans. The recent sharp rise in serious delinquencies on subprime mortgages has made clear that originators were not adequately assessing repayment ability, particularly where mortgages were sold to the secondary market and the originator retained little of the risk. The growth of the secondary market gave lenders—and, thus, mortgage borrowers—greater access to capital markets, lowered transaction costs, and allowed risk to be shared more widely. This ''originate-to-distribute'' model, however, has also contributed to the loosening of underwriting standards, particularly during periods of rapid house price appreciation, which may mask problems by keeping default and delinquency rates low until price appreciation slows or reverses.[17]

This potential tendency has several related causes. First, when an originator sells a mortgage and its servicing rights, depending on the terms of the sale, most or all of the risks typically are passed on to the loan purchaser. Thus, originators that sell loans may have less of an incentive to undertake careful underwriting than if they kept the loans. Second, warranties by sellers to purchasers and other ''repurchase'' contractual provisions have little meaningful benefit if originators have limited assets. Third, fees for some loan originators have been tied to loan volume, making loan sales—sometimes accomplished through aggressive ''push marketing''—a higher priority than loan quality for some originators. Fourth, investors may not exercise adequate due diligence on mortgages in the pools in which they are invested, and may instead rely heavily on credit-ratings firms to determine the quality of the investment.[18]

Fragmentation in the originator market can further exacerbate the problem. Data reported under the Home Mortgage Disclosure Act (HMDA) show that independent mortgage companies—those not related to depository institutions or their subsidiaries or affiliates—in 2005 and 2006 made nearly one-half of first-lien mortgage loans reportable as being higher-priced but only one-fourth of loans that were not reportable as higher-priced. Nor was lending by independent mortgage companies particularly concentrated: In each of 2005 and 2006 around 150 independent mortgage companies made 500 or more first-lien mortgage loans on owner-occupied dwellings that were reportable as higher-priced. In addition, as noted earlier, one source suggests that 60 percent or more of mortgages originated in the last several years were originated through mortgage brokers.[19] This same source estimates the number of brokerage companies at over 50,000 in recent years.

Thus, a securitized pool of mortgages may have been sourced by tens of lenders and thousands of brokers. Investors have limited ability to directly monitor these originators' activities. Further, government oversight of such a fragmented market faces significant challenges because originators operate in different states and under different regulatory and supervisory regimes and different practices in sharing information among regulators. These circumstances may inhibit the ability of regulators to protect consumers from abusive and unaffordable loans.

A Role for New HOEPA Rules

As explained above, consumers in the subprime market face serious constraints on their ability to protect themselves from abusive or unaffordable loans, even with the best disclosures; originators themselves may at times lack sufficient market incentives to ensure loans they originate are affordable; and regulators face limits on their ability to oversee a fragmented subprime origination market. These circumstances warrant imposing a new national legal standard on subprime lenders to help ensure that consumers receive mortgage loans they can afford to repay, and help prevent the equity-stripping abuses that unaffordable loans facilitate. Adopting this standard under authority of HOEPA ensures that it is applied uniformly to all originators and provides consumers an opportunity to redress wrongs through civil actions to the extent authorized by TILA. As explained in the next part, substantial information supplied to the Board through several public hearings confirms the need for new HOEPA rules.

III. The Board's HOEPA Hearings

A. Home Ownership and Equity Protection Act (HOEPA)

The Board has recently held extensive public hearings on consumer protection issues in the mortgage market, including the subprime sector. These hearings were held pursuant to the Home Ownership and Equity Protection Act (HOEPA), which directs the Board to hold public hearings periodically on the home equity lending market and the adequacy of existing law for protecting

[15] *Improving Mortgage Disclosures* at 74–76 (finding that borrowers in the subprime market may have more difficulty understanding their loan terms because their loans are more complex than loans in the prime market).

[16] U.S. Gen. Accounting Office, GAO 04–280, *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending* 97–98 (2004) (stating that the inherent complexity of mortgage loans, some borrowers' lack of financial sophistication, education, or infirmities, and misleading statements and actions by lenders and brokers limit the effectiveness of even clear and transparent disclosures).

[17] Atif Mian and Amir Sufi, *The Consequences of Mortgage Credit Expansion: Evidence from the 2007 Mortgage Default Crisis* (May 2008), available at: *http://ssrn.com/abstract=1072304*.

[18] Benjamin J. Keys, Tanmoy K. Mukherjee, Amit Seru and Vikram Vig, *Did Securitization Lead to Lax Screening? Evidence from Suprime Loans* at 22, available at: *http://ssrn.com/abstract=1093137*.

[19] Data reported by Wholesale Access Mortgage Research and Consulting, Inc., available at *http://www.wholesaleaccess.com*.

the interests of consumers, particularly low income consumers. HOEPA imposes substantive restrictions, and special pre-closing disclosures, on particularly high-cost refinancings and home equity loans (''HOEPA loans'').[20] These restrictions include limitations on prepayment penalties and ''balloon payment'' loans, and prohibitions of negative amortization and of engaging in a pattern or practice of lending based on the collateral without regard to repayment ability.

When it enacted HOEPA, Congress granted the Board authority, codified in TILA Section 129(l), to create exemptions to HOEPA's restrictions and to expand its protections. 15 U.S.C. 1639(l). Under TILA Section 129(l)(1), the Board may create exemptions to HOEPA's restrictions as needed to keep responsible credit available; and under TILA Section 129(l)(2), the Board may adopt new or expanded restrictions as needed to protect consumers from unfairness, deception, or evasion of HOEPA. In HOEPA Section 158, Congress directed the Board to monitor changes in the home equity market through regular public hearings.

Hearings the Board held in 2000 led the Board to expand HOEPA's protections in December 2001.[21] Those rules, which took effect in 2002, lowered HOEPA's rate trigger, expanded its fee trigger to include single-premium credit insurance, added an anti-''flipping'' restriction, and improved the special pre-closing disclosure.

B. Summary of 2006 Hearings

In the summer of 2006, the Board held four hearings in four cities on three broad topics: (1) The impact of the 2002 HOEPA rule changes on predatory lending practices, as well as the effects on consumers of state and local predatory lending laws; (2) nontraditional mortgage products and reverse mortgages; and (3) informed consumer choice in the subprime market. Hearing panelists included mortgage lenders and brokers, credit ratings agencies, real estate agents, consumer advocates, community development groups, housing counselors, academicians, researchers, and state and federal government officials. In addition, consumers, housing counselors, brokers, and other individuals made brief statements at the hearings during an ''open mike'' period. In all, 67 individuals testified on panels and 54 comment letters were submitted to the Board.

Consumer advocates and some state officials stated that HOEPA is generally effective in preventing abusive terms in loans subject to the HOEPA price triggers. They noted, however, that very few loans are made with rates or fees at or above the HOEPA triggers, and some advocated that Congress lower them. Consumer advocates and state officials also urged regulators and Congress to curb abusive practices in the origination of loans that do not meet HOEPA's price triggers.

Consumer advocates identified several particular areas of concern. They urged the Board to prohibit or restrict certain loan features or terms, such as prepayment penalties, and underwriting practices such as ''stated income'' or ''low documentation'' (''low doc'') loans for which the borrower's income is not documented or verified. They also expressed concern about aggressive marketing practices such as steering borrowers to higher-cost loans by emphasizing initial low monthly payments based on an introductory rate without adequately explaining that the consumer will owe considerably higher monthly payments after the introductory rate expires.

Some consumer advocates stated that brokers and lenders should be held to a duty of care such as a duty of good faith and fair dealing or a duty to make only loans suitable for the borrower. These advocates also urged the Board to ban ''yield spread premiums,'' payments that brokers receive from the lender at closing for delivering a loan with an interest rate that is higher than the lender's ''buy rate,'' because they provide brokers an incentive to increase consumers' interest rates. They argued that such steps would align reality with consumers' perceptions that brokers serve their best interests. Consumer advocates also expressed concerns that brokers, lenders, and others may coerce appraisers to misrepresent the value of a dwelling; and that servicers may charge consumers unwarranted fees and in some cases make it difficult for consumers who are in default to avoid foreclosure.

Industry panelists and commenters, on the other hand, expressed concern that state predatory lending laws may reduce the availability of credit for some subprime borrowers. Most industry commenters opposed prohibiting stated income loans, prepayment penalties, or other loan terms, asserting that this approach would harm borrowers more than help them. They urged the Board and other regulators to focus instead on enforcing existing laws to remove ''bad actors'' from the market. Some lenders indicated, however, that restrictions on certain features or practices might be appropriate if the restrictions were clear and narrow. Industry commenters also stated that subjective suitability standards would create uncertainties for brokers and lenders and subject them to excessive litigation risk.

C. Summary of June 2007 Hearing

In light of the information received at the 2006 hearings and the rise in defaults that began soon after, the Board held an additional hearing in June 2007 to explore how it could use its authority under HOEPA to prevent abusive lending practices in the subprime market while still preserving responsible subprime lending. The Board focused the hearing on four specific areas: Lenders' determination of borrowers' repayment ability; ''stated income'' and ''low doc'' lending; the lack of escrows in the subprime market relative to the prime market; and the high frequency of prepayment penalties in the subprime market.

At the hearing, the Board heard from 16 panelists representing consumers, mortgage lenders, mortgage brokers, and state government officials, as well as from academicians. The Board also received almost 100 written comments after the hearing from an equally diverse group.

Industry representatives acknowledged concerns with recent lending practices but urged the Board to address most of these concerns through supervisory guidance rather than regulations under HOEPA. They maintained that supervisory guidance, unlike regulation, is flexible enough to preserve access to responsible credit. They also suggested that supervisory guidance issued recently regarding nontraditional mortgages and subprime lending, as well as market self-correction, have reduced the need for new regulations. Industry representatives support improving mortgage disclosures to help consumers avoid abusive loans. They urged that any substantive rules adopted by the Board be clearly drawn to limit uncertainty and narrowly drawn to avoid unduly restricting credit.

In contrast, consumer advocates, state and local officials, and Members of Congress urged the Board to adopt regulations under HOEPA. They acknowledged a proper place for

[20] HOEPA loans are closed-end, non-purchase money mortgages secured by a consumer's principal dwelling (other than a reverse mortgage) where either: (a) The APR at consummation will exceed the yield on Treasury securities of comparable maturity by more than 8 percentage points for first-lien loans, or 10 percentage points for subordinate-lien loans; or (b) the total points and fees payable by the consumer at or before closing exceed the greater of 8 percent of the total loan amount, or $547 for 2007 (adjusted annually).

[21] Truth in Lending, 66 FR 65604, 65608, Dec. 20, 2001.

guidance but contended that recent problems indicate the need for requirements enforceable by borrowers through civil actions, which HOEPA enables and guidance does not. They also expressed concern that less responsible, less closely supervised lenders are not subject to the guidance and that there is limited enforcement of existing laws for these entities. Consumer advocates and others welcomed improved disclosures but insisted they would not prevent abusive lending. More detailed accounts of the testimony and letters are provided below in the context of specific issues the Board is addressing in these final rules.

D. Congressional Hearings

Congress has also held a number of hearings in the past year about consumer protection concerns in the mortgage market.[22] In these hearings, Congress has heard testimony from individual consumers, representatives of consumer and community groups, representatives of financial and mortgage industry groups and federal and state officials. These hearings have focused on rising subprime foreclosure rates and the extent to which lending practices have contributed to them.

Consumer and community group representatives testified that certain lending terms or practices, such as hybrid adjustable-rate mortgages, prepayment penalties, low or no documentation loans, lack of escrows for taxes and insurance, and failure to consider the consumer's ability to repay have contributed to foreclosures. In addition, these witnesses testified that consumers often believe that mortgage brokers represent their interests and shop on their behalf for the best loan terms. As a result, they argue that consumers do not shop independently to ensure that they are getting the best terms for which they qualify. They also testified that, because originators sell most loans into the secondary market and do not share the risk of default, brokers and lenders have less incentive to ensure consumers can afford their loans.

Financial services and mortgage industry representatives testified that consumers need better disclosures of their loan terms, but that substantive restrictions on subprime loan terms would risk reducing access to credit for some borrowers. In addition, these witnesses testified that applying a fiduciary duty to the subprime market, such as requiring that a loan be in the borrower's best interest, would introduce subjective standards that would significantly increase compliance and litigation risk. According to these witnesses, some lenders would be less willing to offer loans in the subprime market, making it harder for some consumers to get loans.

IV. Interagency Supervisory Guidance

In December 2005, the Board and the other federal banking agencies responded to concerns about the rapid growth of nontraditional mortgages in the previous two years by proposing supervisory guidance. Nontraditional mortgages are mortgages that allow the borrower to defer repayment of principal and sometimes interest. The guidance advised institutions of the need to reduce ''risk layering'' practices with respect to these products, such as failing to document income or lending nearly the full appraised value of the home. The proposal, and the final guidance issued in September 2006, specifically advised lenders that layering risks in nontraditional mortgage loans to subprime borrowers may significantly increase risks to borrowers as well as institutions.[23]

The Board and the other federal banking agencies addressed concerns about the subprime market more broadly in March 2007 with a proposal addressing the heightened risks to consumers and institutions of ARMs with two or three-year ''teaser'' rates followed by substantial increases in the rate and payment. The guidance, finalized in June 2007, sets out the standards institutions should follow to ensure borrowers in the subprime market obtain loans they can afford to repay.[24] Among other steps, the guidance advises lenders to (1) use the fully-indexed rate and fully-amortizing payment when qualifying borrowers for loans with adjustable rates and potentially non-amortizing payments; (2) limit stated income and reduced documentation loans to cases where mitigating factors clearly minimize the need for full documentation of income; (3) provide that prepayment penalty clauses expire a reasonable period before reset, typically at least 60 days.

The Conference of State Bank Supervisors (CSBS) and American Association of Residential Mortgage Regulators (AARMR) issued parallel statements for state supervisors to use with state-supervised entities, and many states have adopted the statements.

The guidance issued by the federal banking agencies has helped to promote safety and soundness and protect consumers in the subprime market. Guidance, however, is not necessarily implemented uniformly by all originators. Originators who are not subject to routine examination and supervision may not adhere to guidance as closely as originators who are. Guidance also does not provide individual consumers who have suffered harm because of abusive lending practices an opportunity for redress. The new and expanded consumer protections that the Board is adopting apply uniformly to all creditors and are enforceable by federal and state supervisory and enforcement agencies and in many cases by borrowers.

V. Legal Authority

A. The Board's Authority Under TILA Section 129(l)(2)

The substantive limitations in new §§ 226.35 and 226.36 and corresponding revisions to §§ 226.32 and 226.34, as well as restrictions on misleading and deceptive advertisements, are based on the Board's authority under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2). That provision gives the Board authority to prohibit acts or practices in connection with:

[22] *E.g., Foreclosure Problems and Solutions: Federal, State, and Local Efforts to Address the Foreclosure Crisis in Ohio: Hearing before the Subcomm. on Housing and Comm. Oppty. of the H. Comm. on Fin. Servs.,* 110th Cong. (2008); *Targeting Federal Aid to Neighborhoods Distressed by the Subprime Mortgage Crisis: Hearing before the Subcomm. on Housing and Comm. Oppty. of the H. Comm. on Fin. Servs.,* 110th Cong. (2008); *Improving Consumer Protections in Subprime Lending: Hearing before the Subcomm. on Int. Comm., Trade, and Tourism of the S. Comm. on Comm., Sci., and Trans.,* 110th Cong. (2008); *H.R. 5679, The Foreclosure Prevention and Sound Mortgage Servicing Act of 2008: Hearing before the Subcomm. on Housing and Comm. Oppty. of the H. Comm. on Fin. Servs.,* 110th Cong. (2008); *Restoring the American Dream: Solutions to Predatory Lending and the Foreclosure Crisis: S. Comm. on Banking, Hsg., and Urban Affairs,* 110th Cong. (2008); *Consumer Protection in Financial Services: Subprime Lending and Other Financial Activities: Hearing before the Subcomm. on Fin. Svcs. and Gen. Gov't of the H. Approp. Comm.,* 110th Cong. (2008); *Progress in Administration and Other Efforts to Coordinate and Enhance Mortgage Foreclosure Prevention: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Legislative Proposals on Reforming Mortgage Practices: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Legislative and Regulatory Options for Minimizing and Mitigating Mortgage Foreclosures: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Ending Mortgage Abuse: Safeguarding Homebuyers: Hearing before the S. Subcomm. on Hous., Transp., and Cmty. Dev. of the S. Comm. on Banking, Hous., and Urban Affairs,* 110th Cong. (2007); *Improving Federal Consumer Protection in Financial Services: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007).

[23] Interagency Guidance on Nontraditional Mortgage Product Risks, 71 FR 58609, Oct. 4, 2006 (*Nontraditional Mortgage Guidance*).

[24] Statement on Subprime Mortgage Lending, 72 FR 37569, Jul. 10, 2007 (*Subprime Statement*).

• Mortgage loans that the Board finds to be unfair, deceptive, or designed to evade the provisions of HOEPA; and

• Refinancing of mortgage loans that the Board finds to be associated with abusive lending practices or that are otherwise not in the interest of the borrower.

The authority granted to the Board under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), is broad. It reaches mortgage loans with rates and fees that do not meet HOEPA's rate or fee trigger in TILA Section 103(aa), 15 U.S.C. 1602(aa), as well as types of mortgage loans not covered under that section, such as home purchase loans. Section 129(l)(2) also authorizes the Board to strengthen the protections in Section 129(c)–(i) for the loans to which Section 103(aa) applies these protections (HOEPA loans). In TILA Section 129 (c)–(i), Congress set minimum standards for HOEPA loans. The Board is authorized to strengthen those standards for HOEPA loans when the Board finds practices unfair, deceptive, or abusive. The Board is also authorized by Section 129(l)(2) to apply those strengthened standards to loans that are not HOEPA loans. Moreover, while HOEPA's statutory restrictions apply only to creditors and only to loan terms or lending practices, Section 129(l)(2) is not limited to acts or practices by creditors, nor is it limited to loan terms or lending practices. *See* 15 U.S.C. 1639(l)(2). It authorizes protections against unfair or deceptive practices when such practices are ''in connection with mortgage loans,'' and it authorizes protections against abusive practices ''in connection with refinancing of mortgage loans.'' Thus, the Board's authority is not limited to regulating specific contractual terms of mortgage loan agreements; it extends to regulating loan-related practices generally, within the standards set forth in the statute.

HOEPA does not set forth a standard for what is unfair or deceptive, but the Conference Report for HOEPA indicates that, in determining whether a practice in connection with mortgage loans is unfair or deceptive, the Board should look to the standards employed for interpreting state unfair and deceptive trade practices statutes and the Federal Trade Commission Act (FTC Act), Section 5(a), 15 U.S.C. 45(a).[25]

Congress has codified standards developed by the Federal Trade Commission (FTC) for determining whether acts or practices are unfair under Section 5(a), 15 U.S.C. 45(a).[26] Under the FTC Act, an act or practice is unfair when it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In addition, in determining whether an act or practice is unfair, the FTC is permitted to consider established public policies, but public policy considerations may not serve as the primary basis for an unfairness determination.[27]

The FTC has interpreted these standards to mean that consumer injury is the central focus of any inquiry regarding unfairness.[28] Consumer injury may be substantial if it imposes a small harm on a large number of consumers, or if it raises a significant risk of concrete harm.[29] The FTC looks to whether an act or practice is injurious in its net effects.[30] The agency has also observed that an unfair act or practice will almost always reflect a market failure or market imperfection that prevents the forces of supply and demand from maximizing benefits and minimizing costs.[31] In evaluating unfairness, the FTC looks to whether consumers' free market decisions are unjustifiably hindered.[32]

The FTC has also adopted standards for determining whether an act or practice is deceptive (though these standards, unlike unfairness standards, have not been incorporated into the FTC Act).[33] First, there must be a representation, omission or practice that is likely to mislead the consumer. Second, the act or practice is examined from the perspective of a consumer acting reasonably in the circumstances. Third, the representation, omission, or practice must be material. That is, it must be likely to affect the consumer's conduct or decision with regard to a product or service.[34]

Many states also have adopted statutes prohibiting unfair or deceptive acts or practices, and these statutes employ a variety of standards, many of them different from the standards currently applied to the FTC Act. A number of states follow an unfairness standard formerly used by the FTC. Under this standard, an act or practice is unfair where it offends public policy; or is immoral, unethical, oppressive, or unscrupulous; and causes substantial injury to consumers.[35]

In adopting final rules under TILA Section 129(l)(2)(A), 15 U.S.C. 1639(l)(2)(A), the Board has considered the standards currently applied to the FTC Act's prohibition against unfair or deceptive acts or practices, as well as the standards applied to similar state statutes.

B. The Board's Authority Under TILA Section 105(a)

Other aspects of these rules are based on the Board's general authority under TILA Section 105(a) to prescribe regulations necessary or proper to carry out TILA's purposes 15 U.S.C. 1604(a). This section is the basis for the requirement to provide early disclosures for residential mortgage transactions as well as many of the revisions to improve advertising disclosures. These rules are intended to carry out TILA's purposes of informing consumers about their credit terms and helping them shop for credit. *See* TILA Section 102, 15 U.S.C. 1603.

VI. The Board's Proposal

On January 9, 2008, the Board published a notice of proposed rulemaking in the **Federal Register** (73 FR 1672) proposing to amend Regulation Z.

A. Proposals To Prevent Unfairness, Deception, and Abuse

The Board proposed new restrictions and requirements for mortgage lending and servicing intended to protect consumers against unfairness, deception, and abuse while preserving responsible lending and sustainable homeownership. Some of the proposed restrictions would apply only to higher-priced mortgage loans, while others

[25] H.R. Rep. 103–652, at 162 (1994) (Conf. Rep.).

[26] *See* 15 U.S.C. 45(n); Letter from FTC to the Hon. Wendell H. Ford and the Hon. John C. Danforth (Dec. 17, 1980).

[27] 15 U.S.C. 45(n).

[28] Statement of Basis and Purpose and Regulatory Analysis, Credit Practices Rule, 42 FR 7740, 7743, March 1, 1984 (*Credit Practices Rule*).

[29] Letter from Commissioners of the FTC to the Hon. Wendell H. Ford, Chairman, and the Hon. John C. Danforth, Ranking Minority Member, Consumer Subcomm. of the H. Comm. on Commerce, Science, and Transp., n.12 (Dec. 17, 1980).

[30] Credit Practices Rule, 42 FR at 7744.

[31] *Id.*

[32] *Id.*

[33] Letter from James C. Miller III, Chairman, FTC to the Hon. John D. Dingell, Chairman, H. Comm. on Energy and Commerce (Oct. 14, 1983) (*Dingell Letter*).

[34] *Dingell Letter* at 1–2.

[35] *See, e.g., Kenai Chrysler Ctr., Inc.* v. *Denison,* 167 P.3d 1240, 1255 (Alaska 2007) (quoting *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244–45 n.5 (1972)); *State* v. *Moran,* 151 N.H. 450, 452, 861 A.2d 763, 755–56 (N.H. 2004) (concurrently applying the FTC's former test and a test under which an act or practice is unfair or deceptive if ''the objectionable conduct * * * attain[s] a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.'') (citation omitted); *Robinson* v. *Toyota Motor Credit Corp.,* 201 Ill. 2d 403, 417–418, 775 N.E.2d 951, 961–62 (2002) (quoting 405 U.S. at 244–45 n.5).

would apply to all mortgage loans secured by a consumer's principal dwelling.

Protections Covering Higher-Priced Mortgage Loans

The Board proposed certain protections for consumers receiving higher-priced mortgage loans. Higher-priced mortgage loans would have been loans with an annual percentage rate (APR) that exceeds the comparable Treasury security by three or more percentage points for first-lien loans, or five or more percentage points for subordinate-lien loans. For such loans, the Board proposed to:

○ Prohibit creditors from engaging in a pattern or practice of extending credit without regard to borrowers' ability to repay from sources other than the collateral itself;

○ Require creditors to verify income and assets they rely upon in making loans;

○ Prohibit prepayment penalties unless certain conditions are met; and

○ Require creditors to establish escrow accounts for taxes and insurance, but permit creditors to allow borrowers to opt out of escrows 12 months after loan consummation.

In addition, the proposal would have prohibited creditors from structuring closed-end mortgage loans as open-end lines of credit for the purpose of evading these rules, which do not apply to lines of credit.

Proposed Protections Covering Closed-End Loans Secured by Consumer's Principal Dwelling

In addition, in connection with all consumer-purpose, closed-end loans secured by a consumer's principal dwelling, the Board proposed to:

○ Prohibit creditors from paying a mortgage broker more than the consumer had agreed in advance that the broker would receive;

○ Prohibit any creditor or mortgage broker from coercing, influencing, or otherwise encouraging an appraiser to provide a misstated appraisal in connection with a mortgage loan; and

○ Prohibit mortgage servicers from ''pyramiding'' late fees, failing to credit payments as of the date of receipt, failing to provide loan payoff statements upon request within a reasonable time, or failing to deliver a fee schedule to a consumer upon request.

B. Proposals To Improve Mortgage Advertising

Another goal of the Board's proposal was to ensure that mortgage loan advertisements provide accurate and balanced information and do not contain misleading or deceptive representations. The Board proposed to require that advertisements for both open-end and closed-end mortgage loans provide accurate and balanced information, in a clear and conspicuous manner, about rates, monthly payments, and other loan features. The proposal was issued under the Board's authorities to: Adopt regulations to ensure consumers are informed about and can shop for credit; require that information, including the information required for advertisements for closed-end credit, be disclosed in a clear and conspicuous manner; and regulate advertisements of open-end home-equity plans secured by the consumer's principal dwelling. *See* TILA Section 105(a), 15 U.S.C. 1604(a); Section 122, 15 U.S.C. 1632; Section 144, 15 U.S.C. 1664; Section 147, 15 U.S.C. 1665b.

The Board also proposed, under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), to prohibit the following seven deceptive or misleading practices in advertisements for closed-end mortgage loans:

○ Advertising ''fixed'' rates or payments for loans whose rates or payments can vary without adequately disclosing that the interest rate or payment amounts are ''fixed'' only for a limited period of time, rather than for the full term of the loan;

○ Comparing an actual or hypothetical consumer's rate or payment obligations and the rates or payments that would apply if the consumer obtains the advertised product unless the advertisement states the rates or payments that will apply over the full term of the loan;

○ Advertisements that characterize the products offered as ''government loan programs,'' ''government-supported loans,'' or otherwise endorsed or sponsored by a federal or state government entity even though the advertised products are not government-supported or -sponsored loans;

○ Advertisements, such as solicitation letters, that display the name of the consumer's current mortgage lender, unless the advertisement also prominently discloses that the advertisement is from a mortgage lender not affiliated with the consumer's current lender;

○ Advertising claims of debt elimination if the product advertised would merely replace one debt obligation with another;

○ Advertisements that create a false impression that the mortgage broker or lender has a fiduciary relationship with the consumer; and

○ Foreign-language advertisements in which certain information, such as a low introductory ''teaser'' rate, is provided in a foreign language, while required disclosures are provided only in English.

C. Proposal To Give Consumers Disclosures Early

A third goal of the proposal was to provide consumers transaction-specific disclosures early enough to use while shopping for a mortgage loan. The Board proposed to require creditors to provide transaction-specific mortgage loan disclosures such as the APR and payment schedule for all home-secured, closed-end loans no later than three business days after application, and before the consumer pays any fee except a reasonable fee for the originator's review of the consumer's credit history.

VII. Overview of Comments Received

The Board received approximately 4700 comments on the proposal. The comments came from community banks, independent mortgage companies, large bank holding companies, secondary market participants, credit unions, state and national trade associations for financial institutions in the mortgage business, mortgage brokers and mortgage broker trade associations, realtors and realtor trade associations, individual consumers, local and national community groups, federal and state regulators and elected officials, appraisers, academics, and other interested parties.

Commenters generally supported the Board's effort to protect consumers from unfair practices, particularly in the subprime market, while preserving responsible lending and sustainable homeownership. However, industry commenters generally opposed the breadth of the proposal; favoring narrower and more flexible rules. They also expressed concerns about the costs of certain proposals, such as the requirement to establish escrows for all first-lien higher-priced mortgage loans. Consumer advocates, federal and state regulators (including the Federal Deposit Insurance Corporation (FDIC)), and elected officials (including members of Congress and some state attorneys general) supported the proposal as addressing some of the abuses in the subprime market, but argued that additional consumer protections are needed.

Many commenters supported the approach of using loan price to identify ''higher-priced'' loans. Financial institution commenters and their trade associations were concerned, however, that the proposed price thresholds were too low, and could capture many prime loans. They contended that broad coverage would reduce credit availability because creditors would refrain from making covered loans or would pass on compliance costs. Many industry commenters urged the Board to use a different index to define higher-priced mortgage loans than the proposed index of Treasury security yields, because the spread between Treasury yields and mortgage rates can change. Consumer advocate commenters generally, but not uniformly, favored applying the Board's proposed protections to all loans secured by a principal dwelling regardless of loan price. In the alternative, they favored the proposed price thresholds but urged the Board also to apply the protections to nontraditional mortgage loans.

Industry commenters generally, but not uniformly, supported or did not oppose a rule prohibiting lenders from engaging in a pattern or practice of unaffordable lending. They urged the Board, however, to provide a clear and specific ''safe harbor'' and remove the presumptions of violations in order to avoid unduly constraining credit. In contrast, consumer advocate commenters and others urged the Board to revise the ability to repay rule so that it applies on a loan-by-loan basis and not only to a pattern or practice of disregarding borrowers' ability to repay. These commenters argued that a requirement to prove a ''pattern or practice'' would prevent consumers from bringing claims and would weaken the rule's power to deter abuse.

Consumer advocate commenters and some federal and state regulators and elected officials also maintained that a complete ban on prepayment penalties is necessary to protect consumers. In particular, many of these commenters argued that prepayment penalties' harms to subprime consumers outweigh the benefits of any reductions in interest rate consumers receive, and that the Board's proposed restrictions on prepayment penalties would not adequately address the harms. However, most banks and their trade associations stated that the interest rate benefit afforded to consumers with loans having prepayment penalty provisions lowers credit costs and increases credit availability.

Many community banks and mortgage brokers as well as several industry trade associations opposed the proposed escrow requirement, contending that escrow infrastructures would be costly and that creditors would either refrain from making higher-priced loans or would pass costs on to consumers. Consumers also expressed concern that they would lose interest on their escrowed funds and that servicers would fail to properly pay tax and insurance obligations. Several industry trade associations, several large creditors and some mortgage brokers, consumer and community development groups, and state and federal officials, however, supported the proposed escrow requirement as protecting consumers from expensive force-placed insurance or default, and possibly foreclosure.

For their part, mortgage brokers and their trade associations principally addressed the yield spread premium proposal, which they strongly opposed. They, as well as FTC staff, argued that prohibiting creditors from paying brokers more than the consumer agreed to in writing would put brokers at a competitive disadvantage relative to retail lenders. They also argued that consumers would be confused and misled by a broker compensation disclosure. Consumer advocates, several members of Congress, several state attorneys general, and the FDIC contended that the proposal would do little to protect consumers and urged the Board to ban yield spread premiums outright.

Most commenters generally supported the Board's proposed advertising rules, although some commenters requested clarifications and modifications. Commenters were divided about the proposal to require early mortgage loan disclosures. Many creditors and their trade associations opposed the proposal because of perceived operational cost and compliance difficulties, and concerns about the scope of the fee restriction and its application to third party originators. Consumer groups, state regulators and enforcement generally supported the proposed rule, however, because it would make more information available to consumers when they are shopping for loans. Some of the commenters requested that the Board require lenders to redisclose before loan consummation to enhance the accuracy of information.

Industry commenters urged the Board to adopt all of the proposed restrictions in §§ 226.35 and 226.36 under its TILA Section 105(a) authority rather than its Section 129(l)(2) authority. They argued that using Section 129(l)(2) authority would impose disproportionately heavy penalties on lenders for violations and unnecessary costs on consumers. Consumer advocates, on the other hand, supported using Section 129(l)(2) authority and urged the Board use it more broadly to adopt the other proposed rules concerning early disclosures and advertising.

Public comments with respect to these and other provisions of the rule are described and discussed in more detail below.

VIII. Definition of ''Higher-Priced Mortgage Loan''—§ 226.35(a)

A. Overview

The Board proposed to extend certain consumer protections to a subset of consumer residential mortgage loans referred to as ''higher-priced mortgage loans.'' This part VIII discusses the definition of ''higher-priced mortgage loan'' the Board is adopting. A discussion of the specific protections that apply to these loans follows in part IX. The Board is also finalizing the proposal to apply certain other restrictions to closed-end consumer mortgage loans secured by the consumer's principal dwelling without regard to loan price. These restrictions are discussed separately in part X.

Under the proposal, higher-priced mortgage loans would be defined as consumer credit transactions secured by the consumer's principal dwelling for which the APR on the loan exceeds the yield on comparable Treasury securities by at least three percentage points for first-lien loans, or five percentage points for subordinate-lien loans. The proposed definition would include home purchase loans, refinancings, and home equity loans. The definition would exclude home equity lines of credit (''HELOCs''). There would also be exclusions for reverse mortgages, construction-only loans, and bridge loans.

The Board is adopting a definition of ''higher-priced mortgage loan'' that is substantially similar to that proposed but different in the particulars. The changes to the final rule are being made in response to commenters' concerns. The final definition, like the proposed definition, sets a threshold above a measure of market rates to distinguish higher-priced mortgage loans from the rest of the mortgage market. But the measure the Board is adopting is different, and therefore so is the threshold. Instead of yields on Treasury securities, the definition uses average offer rates for the lowest-risk prime mortgages, termed ''average prime offer rates.'' For the foreseeable future, the Board will obtain or, as applicable, derive average prime offer rates from the Freddie Mac Primary Mortgage Market Survey®. The threshold is set at 1.5 percentage points above the average prime offer rate on a comparable transaction for first-lien loans, and 3.5 percentage points for subordinate-lien loans. The exclusions from ''higher-priced mortgage loans'' for HELOCs and certain other types of transactions are adopted as proposed.

The definition of ''higher-priced mortgage loans'' appears in § 226.35(a). Such loans are subject to the restrictions and requirements in § 226.35(b) concerning repayment ability, income verification, prepayment penalties, escrows, and evasion, except that only first-lien higher-priced mortgage loans are subject to the escrow requirement.

B. Public Comment on the Proposal

Most industry commenters, a national consumer advocacy and research organization, and others supported the approach of using loan price to identify loans subject to stricter regulations. A large number and wide variety of these commenters, however, urged the Board to use a prime mortgage market rate instead of, or in addition to, Treasury yields to avoid arbitrary changes in coverage due to changes in the premium for mortgages over Treasuries or in the relationship between short-term and long-term Treasury yields. The precise recommendations are discussed in more detail in subpart D below. Industry commenters were particularly concerned that the threshold over the chosen index be set high enough to exclude the prime market. They maintained that the proposed thresholds of 300 and 500 basis points over Treasury yields would cover a significant part of the prime market and reduce credit availability.

Consumer and civil rights group commenters generally, but not uniformly, opposed limiting protections to higher-priced mortgage loans and recommended applying these protections to all loans secured by a principal dwelling. They recommended in the alternative that the thresholds be adopted at the levels proposed, or even lower, and that nontraditional mortgage loans, which permit non-amortizing payments or negatively amortizing payments, be covered regardless of loan price. They believe the Nontraditional Mortgage Guidance is not adequate to protect consumers.

The proposed exclusion of HELOCs drew criticism from several consumer and civil rights groups but strong support from industry commenters. The other proposed exclusions drew limited comment. Some industry commenters proposed additional exclusions for loans with federal guaranties such as FHA, VA, and Rural Housing Service. A few commenters also proposed excluding ''jumbo'' loans, that is, loans in an amount that exceeds the threshold of eligibility for purchase by Fannie Mae or Freddie Mac. Other proposed exclusions are discussed below.

C. General Approach

Cover Subprime, Exclude Prime

The Board stated in connection with the proposal a general principle that new regulations should be applied as broadly as needed to protect consumers from actual or potential injury, but not so broadly that the costs, including the always-present risk of unintended consequences, would clearly outweigh the benefits. Consistent with this principle, the Board believes, as it stated in connection with the proposal, that the stricter regulations of § 226.35 should cover the subprime market and generally exclude the prime market.

The Board believes that the practices that § 226.35 would prohibit—lending without regard to ability to pay from verified income and non-collateral assets, failure to establish an escrow for taxes and insurance, and prepayment penalties outside of prescribed limits—are so clearly injurious on balance to consumers within the subprime market that they should be categorically barred in that market. The reasons for this conclusion are detailed below in part IX with respect to each practice. Moreover, the Board has concluded that, to be effective, these prohibitions must cover the entire subprime market and not just subprime products with particular terms or features. Market imperfections discussed in part II—the subprime market's lack of transparency and potentially inadequate incentives for creditors to make only loans that consumers can repay—affect consumers throughout the subprime market. To be sure, risk within the subprime market has varied by loan type. For example, delinquencies on fixed-rate subprime mortgages have been lower in recent years than on adjustable-rate subprime mortgages. It is not likely to be practical or effective, however, to target certain types of loans in the subprime market for coverage while excluding others. Such a rule would be unduly complex, likely fail to adapt quickly enough to ever-changing products, and encourage creditors to steer borrowers to uncovered products.

In the prime market, however, the Board believes that a case-by-case approach to determining whether the § 226.35 practices are unfair or deceptive is more appropriate. By nature, loans in the prime market have a lower credit risk. Moreover, the prime market is more transparent and competitive, characteristics that make it less likely a creditor can sustain an unfair, abusive, or deceptive practice. In addition, borrowers in the prime market are less likely to be under the degree of financial stress that tends to weaken the ability of many borrowers in the subprime market to protect themselves against unfair, abusive, or deceptive practices. The final rule applies protections against coercion of appraisers and unfair servicing practices to the prime market because, with respect to these particular practices, the prime market, too, suffers a lack of transparency and these practices do not appear to be limited to the subprime market.

With these limited exceptions, at present the Board believes that any undue risks to consumers in the prime market from particular loan terms or lending practices are better addressed through means other than new regulations under HOEPA. Supervisory guidance from the federal agencies influences a large majority of the prime market which, unlike the subprime market, has been dominated by federally supervised institutions.[36] Such guidance affords regulators and institutions alike more flexibility than a regulation, with potentially fewer unintended consequences. In addition, the standards the Government Sponsored Enterprises set for the loans they will purchase continue to have significant influence within the prime market, and these entities are accountable for those standards to regulators and Congress.[37]

Use the APR

The Board also continues to believe—and few, if any, commenters disagreed—that the best way to identify the subprime market is by loan price rather than by borrower characteristics. Identifying a class of protected borrowers would present operational difficulties and other problems. For example, it is common to distinguish borrowers by credit score, with lower-scoring borrowers generally considered to be at higher risk of injury in the mortgage market. Defining the protected field as lower-scoring consumers would fail to protect higher-scoring consumers ''steered'' to loans meant for lower-scoring consumers. Moreover, the market uses different commercial scores, and choosing a particular score

[36] According to HMDA data from 2005 and 2006, more than three-quarters of prime, conventional first-lien mortgage loans on owner-occupied properties were made by depository institutions or their affiliates. For this purpose, a loan for which price information was not reported is treated as a prime loan.

[37] According to HMDA data from 2005 and 2006, nearly 30 percent of prime, conventional first-lien mortgage loans on owner-occupied properties were purchased by Fannie Mae or Freddie Mac. This figure understates the GSEs' influence on the prime market because it excludes the many loans that were underwritten using the GSEs' standards but were not sold to the GSEs.

as the benchmark for a regulation could give unfair advantage to the company that provides that score.

The most appropriate measure of loan price for this regulation is the APR; few, if any, commenters disagreed with this point either. The APR corresponds closely to credit risk, that is, the risk of default as well as the closely related risks of serious delinquency and foreclosure. Loans with higher APRs generally have higher credit risks, whatever the source of the risk might be—weaker borrower credit histories, higher borrower debt-to-income ratios, higher loan-to-value ratios, less complete income or asset documentation, less traditional loan terms or payment schedules, or combinations of these or other risk factors. Because disclosing an APR has long been required by TILA, the figure is also very familiar and readily available to creditors and consumers. Therefore, the Board believes it appropriate to use a loan's APR to identify loans having a high enough credit risk to warrant the protections of § 226.35.

Two loans with identical risk characteristics will likely have different APRs if they were originated when market rates were different. It is important to normalize the APR by an index that moves with mortgage market rates so that loans with the same risk characteristics will be treated the same regardless of when the loans were originated. The Board proposed to use as this index the yields on comparable Treasury securities, which HOEPA uses currently to identify HOEPA-covered loans, *see* TILA Section 103(aa), 15 U.S.C. 1602(aa), and § 226.32(a), and Regulation C uses to identify mortgage loans reportable under HMDA as being higher-priced, *see* 12 CFR 203.4(a)(12). For reasons discussed in more detail below, the final rule uses instead an index that more closely tracks movements in mortgage rates than do Treasury yields.

Uncertainty

As the Board stated in connection with the proposal, there are three major reasons why it is inherently uncertain which APR threshold would achieve the twin objectives of covering the subprime market and generally excluding the prime market. First, there is not a uniform definition of the prime or subprime market, or of a prime or subprime loan. Moreover, the markets are separated by a somewhat loosely defined segment known as the alt-A market, the precise boundaries of which are not clear.

Second, available data sets provide only a rough measure of the empirical relationship between APR and credit risk. A proprietary dataset such as the loan-level data on subprime securitized mortgages published by First American LoanPerformance may contain detailed information on loan characteristics, including the contract rate, but lack the APR or sufficient data to derive the APR. Other data must be consulted to estimate APRs based on contract rates. HMDA data contain the APR for mortgage loans reportable as being higher-priced (as adjusted by comparable Treasury securities), but they have little information about credit risk.

Third, data sets can of course show only the existing or past distribution of loans across market segments, which may change in ways that are difficult to predict. In particular, the distribution could change in response to the Board's imposition of the restrictions in § 226.35, but the likely direction of the change is not clear. ''Over compliance'' could effectively lower the threshold. While a loan's APR can be estimated early in the application process, it is typically not known to a certainty until after the underwriting has been completed and the interest rate has been locked. Creditors might build in a ''cushion'' against this uncertainty by voluntarily setting their internal thresholds lower than the threshold in the regulation.

Creditors would have a competing incentive to avoid the restrictions, however, by restructuring the prices of potential loans that would have APRs just above the threshold to cause the loans' APRs to come under the threshold. Different combinations of contract rates and points that are economically identical for an originator produce different APRs. With the adoption of § 226.35, an originator may have an incentive to achieve a rate-point combination that would bring a loan's APR below the threshold (if the borrower had the resources or equity to pay the points). Moreover, some fees, such as late fees and prepayment penalties, are not included in the APR. Creditors could increase the number or amounts of such fees to maintain a loan's effective price while lowering its APR below the threshold. It is not clear whether the net effect of these competing forces of over-compliance and circumvention would be to capture more, or fewer, loans.

For all of the above reasons, there is inherent uncertainty as to what APR threshold would perfectly achieve the objectives of covering the subprime market and generally excluding the prime market. In the face of this uncertainty, deciding on an APR threshold calls for judgment. As the Board stated with the proposal, the Board believes it is appropriate to err on the side of covering somewhat more than the subprime market.

The Alt-A Market

If the selected thresholds cover more than the subprime market, then they likely extend into what has been known as the alt-A market. The alt-A market is generally understood to be for borrowers who typically have higher credit scores than subprime borrowers but still pose more risk than prime borrowers because they make small down payments or do not document their incomes, or for other reasons. The definition of this market is not precise, however.

The Board judges that the benefits of extending § 226.35's restrictions into some part of the alt-A market to ensure coverage of the entire subprime market outweigh the costs. This market segment also saw undue relaxation of underwriting standards, one reason that its share of residential mortgage originations grew sixfold from 2003 to 2006 (from two percent of originations to 13 percent). [38] *See* part VIII.C for further discussion of the relaxation of underwriting standards in the alt-A market.

To the extent § 226.35 covers the higher-priced end of the alt-A market, where risks in that segment are highest, the regulation will likely benefit consumers more than it would cost them. Prohibiting lending without regard to repayment ability in this market slice would likely reduce the risk to consumers from ''payment shock'' on nontraditional loans. Applying the income verification requirement of §§ 226.32(a)(4)(ii) and 226.35(b)(1) to the riskier part of the alt-A market could ameliorate injuries to consumers from lending based on inflated incomes without necessarily depriving consumers of access to credit.

D. Index for Higher-Priced Mortgage Loans

Under the proposal, higher-priced mortgage loans would be defined as consumer credit transactions secured by the consumer's principal dwelling for which the APR on the loan exceeds the yield on comparable Treasury securities by at least three percentage points for first-lien loans, or five percentage points for subordinate-lien loans. The proposed definition would include home purchase loans, refinancings of home purchase loans, and home equity

[38] *IMF 2007 Mortgage Market* at 4.

loans. The definition would exclude home equity lines of credit (''HELOCs''), reverse mortgages, construction-only loans, and bridge loans.

The Board is adopting a definition of ''higher-priced mortgage loan'' that is substantially similar to that proposed but different in the particulars. The final definition, like the proposed definition, sets a threshold above a measure of market rates to distinguish higher-priced mortgage loans from the rest of the mortgage market. But the measure the Board is adopting is different, and therefore so is the threshold. Instead of yields on Treasury securities, the final definition uses average offer rates for the lowest-risk prime mortgages, termed ''average prime offer rates.'' For the foreseeable future, the Board will obtain or, as applicable, derive average prime offer rates for a wide variety of types of transactions from the Primary Mortgage Market Survey® (PMMS) conducted by Freddie Mac, and publish these rates on at least a weekly basis. The Board will conduct its own survey if it becomes appropriate or necessary to do so. The threshold is set at 1.5 percentage points above the average prime offer rate on a comparable transaction for first-lien loans, and 3.5 percentage points for subordinate-lien loans. The exclusions from ''higher-priced mortgage loans'' for HELOCs and certain other types of transactions are adopted as proposed.

Public Comment

A large number and wide variety of industry commenters, as well as a consumer research and advocacy group, urged the Board to use a prime mortgage market rate instead of, or in addition to, Treasury yields. First, they argued the tendency of prime mortgage rates at certain times to deviate significantly from Treasury yields—such as during the ''flight to quality'' seen in recent months—would lead to unwarranted coverage of the prime market and arbitrary swings in coverage. Many of these commenters also pointed out that changes in the Treasury yield curve (the relationship of short-term to long-term Treasury yields) can increase or decrease coverage even though neither borrower risk profiles nor creditor practices or products have changed. The Board's proposal to address this second problem by matching Treasuries to mortgages on the basis of the loan's expected life span drew limited, but mostly negative, comment. Although one large lender specifically agreed with the proposed matching rules, a few others stated the rules were too complicated.

The precise recommendations for a measure of mortgage market rates varied. Several commenters specifically recommended using the PMMS. They recommended that a threshold be added to the PMMS figure because it is, by design, at the low end of the range of rates that can be found in the prime market. Recommendations for thresholds for first-lien loans ranged from 150 to 300 basis points over the PMMS. Some commenters recommended approaches that would rely on both Treasuries and the PMMS. A few recommended the approach of a recent North Carolina law, which covers a first-lien loan only if its APR exceeds two thresholds: 300 basis points over the comparable Treasury yield and 175 basis points over the PMMS rate for the 30-year fixed-rate loan. A few recommended a different way to integrate Treasuries and the PMMS. Under this approach, the threshold would be set at the comparable Treasury yield (determined as proposed) plus 200 basis points (400 for subordinate-lien loans), plus the spread between the PMMS 30-year FRM rate and the seven-year Treasury.

Some commenters offered alternatives to the PMMS. A consumer research and advocacy group and Freddie Mac suggested that the Board could use the higher of the Freddie Mac Required Net Yield (the yield Freddie Mac expects from purchasing a conforming mortgage) and the equivalent Fannie Mae yield. Fannie Mae offered a similar, but not identical, recommendation to use the higher of the current coupon yield for Fannie Mae Mortgage Backed Securities and Freddie Mac participation certifications (PC). These yields reflect the price at which a government-sponsored entity (GSE) security can be sold in the market. At least one commenter suggested that the Board could conduct its own survey of mortgage market rates.

Discussion

Based on these comments and the analysis below, the final rule does not use Treasury yields as the index for higher-priced mortgage loans. Instead, the rule uses average offer rates on the lowest-risk prime mortgage loans, termed ''average prime offer rates.'' For the foreseeable future, the Board will obtain or, as applicable, derive these rates for a wide variety of types of transactions from the PMMS and publish them on a weekly basis.

Drawbacks of using Treasury security yields. There are significant advantages to using Treasury yields to set the APR thresholds. Treasuries are traded in a highly liquid market; Treasury yield data are published for many different maturities and can easily be calculated for other maturities; and the integrity of published yields is not subject to question. For these reasons, Treasuries are also commonly used in federal statutes, such as HOEPA, for benchmarking purposes.

As recent events have highlighted, however, using Treasury yields to set the APR threshold in a law regulating mortgage loans has two major disadvantages. The most significant disadvantage is that the spread between Treasuries and mortgage rates, even prime mortgage rates, changes in the short term and in the long term. Moreover, the comparable Treasury security for a given mortgage loan is quite difficult to determine accurately.

The Treasury-mortgage spread can change for at least three different reasons. First, credit risk may change on mortgages, even for the highest-quality borrowers. For example, credit risk increases when house prices fall. Second, competition for prime borrowers can increase, tightening spreads, or decrease, allowing lenders to charge wider spreads. Third, movements in financial markets can affect Treasury yields but have no effect on lenders' cost of funds or, therefore, on mortgage rates. For example, Treasury yields fall disproportionately more than mortgage rates during a ''flight to quality.''

Recent events illustrate how much the Treasury-mortgage spread can swing. The spread averaged about 170 basis points in 2007, but increased to an average of about 220 basis points in the first half of 2008. In addition, the spread was highly volatile in this period, shifting as much as 25 basis points in a week. The spread may decrease, but predictions of long-term spreads are highly uncertain.

Changes in the Treasury-mortgage spread can undermine key objectives of the regulation. These changes mean that loans with identical credit risk are covered in some periods but not in others, contrary to the objective of consistent and predictable coverage over time. Moreover, lenders' uncertainty as to when such changes will occur can cause them to set an internal threshold below the regulatory threshold. This may reduce credit availability directly (if a lender's policy is not to make higher-priced mortgage loans) or indirectly, by increasing regulatory burden. The recent volatility might lead lenders to set relatively conservative cushions.

Adverse consequences of volatility in the spread between mortgages rates and Treasuries could be reduced simply by setting the regulatory threshold at a high enough level to ensure it excludes all prime loans. But a threshold high enough to accomplish this objective would likely fail to meet another, equally important objective of covering essentially all of the subprime market. Instead, the Board is adopting a rate that closely follows mortgage market rates, which should mute the effects on coverage of changes in the spread between mortgage rates and Treasury yields.

The second major disadvantage of using Treasury yields to set the threshold is that the comparable Treasury security for a given mortgage loan is quite difficult to determine accurately. Regulation C determines the comparable Treasury security on the basis of contractual maturity: A loan is matched to a Treasury with the same contract term. For example, the regulation matches a 30-year mortgage loan to a 30-year Treasury security. This method does not, however, account for the fact that very few loans reach their full maturity, and it causes significant distortions when the yield curve changes shape.[39] These distortions can bias coverage, sometimes in unpredictable ways, and consequently might influence the preferences of lenders to offer certain loan products in certain environments. For example, a steep yield curve will create two regulatory forces pushing the subprime market toward ARMs: A lender could avoid coverage on the margins by selling ARMs rather than fixed-rate mortgages, and the consumer would receive an APR that understates the interest rate risk from an ARM relative to that from a fixed-rate mortgage. (Regulation Z requires the APR be calculated as if the index does not change; a steep yield curve indicates that the index will likely rise.) Artificial regulatory incentives to increase ARMs production in the subprime market could undermine consumer protection.

The Board proposed to reduce distortions in coverage resulting from changes in the yield curve by matching loans to Treasury securities on the basis of the loan's expected life span rather than its legal term to maturity. For example, the Board proposed to match a 30-year fixed-rate mortgage loan to a 10-year Treasury security on the supposition that the mortgage loan will prepay (or default) in ten years or less. A limitation of this approach is that loan life spans change as rates of house price appreciation, mortgage rates, and macroeconomic factors such as unemployment rates change. Loan life spans also change as specific loan features that influence default or prepayment rates change, such as prepayment penalties. The challenge of adjusting the regulation's matching rules on a timely basis would be substantial, and too-frequent adjustments would complicate creditors' compliance. Indeed, many commenters judged the proposed matching rules to be too complicated. This matching problem can be reduced, if not necessarily eliminated, by using mortgage market rates instead of Treasury security yields to set the threshold.

A rate from the prime mortgage market. To address the principal drawbacks of Treasury security yields, the Board is adopting a final rule that relies instead on a rate that more closely tracks rates in the prime mortgage market. Section 226.35(a)(2) defines an ''average prime offer rate'' as an annual percentage rate derived from average interest rates, points, and other pricing terms offered by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. Comparing a transaction's annual percentage rate to this average offered annual percentage rate, rather than to an average offered contract interest rate, should make the rule's coverage more accurate and consistent. A transaction is a higher-priced mortgage loan if its APR exceeds the average prime offer rate for a comparable transaction by 1.5 percentage points, or 3.5 percentage points in the case of a subordinate-lien transaction. (The basis for selecting these thresholds is explained further in part VIII.E) The creditor uses the most recently available average prime offer rate as of the date the creditor sets the transaction's interest rate for the final time before consummation.

To facilitate compliance, the final rule and commentary provide that the Board will derive average prime offer rates from survey data according to a methodology it will make publicly available, and publish these rates in a table on the Internet on at least a weekly basis. This table will indicate how to identify a comparable transaction.

As noted above, the survey the Board intends to use for the foreseeable future is the PMMS, which contains weekly average rates and points offered by a representative sample of creditors to prime borrowers seeking a first-lien, conventional, conforming mortgage and who would have at least 20 percent equity. The PMMS contains pricing data for four types of transactions: ''1-year ARM,'' ''5/1-year ARM,'' ''30-year fixed,'' and ''15-year fixed.'' For the two types of ARMs, PMMS pricing data are based on ARMs that adjust according to the yield on one-year Treasury securities; the pricing data include the margin and the initial rate (if it differs from the sum of the index and margin). These data are updated every week and are published on Freddie Mac's Web site.[40]

The Freddie Mac PMMS is the most viable option for obtaining average prime offer rates. This is the only publicly available data source that has rates for more than one kind of fixed-rate mortgage (the 15-year and the 30-year) and more than one kind of variable-rate mortgage (the 1-year ARM and the 5/1 ARM). Having rates on at least two fixed-rate products and at least two variable-rate products supplies a firmer basis for estimating rates for other fixed-rate and variable-rate products (such as a 20-year fixed or a 3/1 ARM).

Other publicly available surveys the Board considered are less suitable for the purposes of this rule. Only one ARM rate is collected by the Mortgage Bankers Association's Weekly Mortgage Applications Survey and the Federal Housing Finance Board's Monthly Survey of Interest Rates and Terms on Conventional Single-Family Non-Farm Mortgage Loans. Moreover, the FHFB Survey has a substantial lag because it is monthly and reports rates on closed loans. The Board also evaluated two non-survey options involving Fannie Mae and Freddie Mac. One is the Required Net Yield, the prices these institutions will pay to purchase loans directly. The other is the yield on mortgage-backed securities issued by Fannie Mae and Freddie Mac. With either option, data for ARM yields would be difficult to obtain.

These other data sources, however, provide useful benchmarks to evaluate the accuracy of the PMMS. The PMMS has closely tracked these other indices, according to a Board staff analysis. The Board will continue to use them periodically to help it determine whether the PMMS remains an appropriate data source for Regulation Z. If the PMMS ceases to be available, or if circumstances arise that render it unsuitable for this rule, the Board will consider other alternatives including conducting its own survey.

The Board will use the pricing terms from the PMMS, such as interest rate and points, to calculate an annual percentage rate (consistent with Regulation Z, § 226.22) for each of the four types of transactions that the

[39] Robert B. Avery, Kenneth P. Brevoort, and Glenn B. Canner, *Higher-Priced Home Lending and the 2005 HMDA Data*, 92 Fed. Res. Bulletin A123–66 (Sept. 8, 2006).

[40] *See http://www.freddiemac.com/dlink/html/PMMS/display/PMMSOutputYr.jsp.*

PMMS reports. These annual percentage rates are the average prime offer rates for transactions of that type. The Board will derive annual percentage rates for other types of transactions from the loan pricing terms available in the survey. The method of derivation the Board expects to use is being published for comment in connection with the simultaneously proposed revisions to Regulation C. When finalized, the method will be published on the Internet along with the table of annual percentage rates.

E. Threshold for Higher-Priced Mortgage Loans

The Board proposed a threshold of three percentage points above the comparable Treasury security for first-lien loans, or five percentage points for subordinate-lien loans. Since the final rule uses a different index, it must also use a different threshold. The Board is adopting a threshold for first-lien loans of 1.5 percentage points above the average prime offer rate for a comparable transaction, and 3.5 percentage points for second-lien loans.

Public Comment

Industry commenters consistently contended that, should the Board use Treasury yields as proposed, thresholds of 300 and 500 basis points would be too low to meet the Board's stated objective of excluding the prime market.[41] These commenters recommended thresholds of 400 basis points (600 for subordinate-lien loans) or higher, but a few trade associations recommended 500 (700) or 600 (800). These commenters contended that covering any part of the prime market would harm consumers because the secondary market would not purchase loans with rates over the threshold. They also stated that many originators would seek to avoid originating such loans because of a stigma these commenters expect will attach to such loans, the increased compliance cost associated with the proposed regulations, and the substantial monetary recovery TILA Section 130 would provide plaintiffs for violations of the regulations.

A trade association for the manufactured housing industry submitted that the proposed thresholds would cover a substantial majority of personal property loans used to purchase manufactured homes. This commenter contended that the reasons these loans are priced higher than loans secured by real estate (such as the smaller loan amounts and the lack of real property securing the loan) do not support a rule that would cover personal property loans disproportionately.

Consumer and civil rights group commenters generally, but not uniformly, opposed limiting protections to higher-rate loans and recommended applying these protections to all loans secured by a principal dwelling. They recommended in the alternative that the thresholds be adopted at the levels proposed or even lower. They argued it was critical to cover all of the subprime market and much if not all of the alt-A market.

Discussion

As discussed above, the Board has concluded that the stricter regulations of § 226.35 should cover the subprime market and generally exclude the prime market; and in the face of uncertainty it is appropriate to err on the side of covering somewhat more than the subprime market. Based on available data, it appeared that the thresholds the Board proposed would capture all of the subprime market and a portion of the alt-A market.[42] Based also on available data, the Board believes that the thresholds it is adopting would cover all, or virtually all, of the subprime market and a portion of the alt-A market. The Board considered loan-level origination data for the period 2004 to 2007 for subprime and alt-A securitized pools. The proprietary source of these data is FirstAmerican Loan Performance.[43] The Board also ascertained from a proprietary database of mostly prime loans (McDash Analytics) that coverage of the prime market during the first three quarters of 2007 at these thresholds would have been very limited. The Board recognizes that the recent mortgage market disruption began at the end of this period, but it is the latest period for which data were available.

The Board is adopting a threshold for subordinate-lien loans of 3.5 percentage points. This is consistent with the Board's proposal to set the threshold over Treasury yields for these loans two percentage points above the threshold for first-lien loans. With rare exceptions, commenters explicitly endorsed, or at least did not raise any objection to, this approach. The Board recognizes that it would be preferable to set a threshold for second-lien loans above a measure of market rates for second-lien loans, but it does not appear that a suitable measure of this kind exists. Although data are very limited, the Board believes it is appropriate to apply the same difference of two percentage points to the thresholds above average prime offer rates.

As discussed earlier, the Board recognizes that there are limitations to making judgments about the future scope of the rule based on past data. For example, when the final rule takes effect, the risk premiums for alt-A loans compared to the conforming loans in the PMMS may be higher than the risk premiums for the period 2004–2007. In that case, coverage of alt-A loans would be higher than an estimate for that period would indicate.

Another important example is prime ''jumbo'' loans, or loans extended to borrowers with low-risk mortgage

[41] One trade association reported that some of its members found the proposal would have covered up to one-third of prime loans originated between November 2007 and January 2008. This and other commenters said the effect was particularly pronounced with ARMs. Several members of this association were reported to have found that more than one-half of prime 7/1, 5/1, and 3/1 ARMs originated between November 2007 and January 2008 would have been covered. A different association of mortgage lenders indicated that some of its members had found that almost 20 percent of prime and alt-A loans would be covered under the proposal, though the time frame its members used was not specified. A major lender reported that the proposal would have captured 8–10 percent of its portfolio in 2006 and 2007, about twice the portion of its portfolio that it was required to report as higher-priced under HMDA. The lender represents that it did not make subprime loans in this period and asserts that its figures are predictive of the impact the proposal would have on the prime market overall. Another large lender that stated it does not make subprime loans believes that about 10 percent of its current originations would fall above the proposed thresholds. One lender, however, expressed satisfaction with the proposed 300 basis points for first-lien loans and said an internal analysis of historical data found it would not have captured significant numbers of its prime loans. But this lender's analysis found that significant numbers of prime subordinate-lien loans would have been captured, leading the lender to recommend raising the threshold for subordinate-lien loans to 600 basis points.

[42] The Board noted in the proposal that the percentage of the first-lien mortgage market Regulation C has captured as higher-priced using a threshold of three percentage points has been greater than the percentage of the total market originations that one industry source has estimated to be subprime (25 percent vs. 20 percent in 2005; 28 percent vs. 20 percent in 2006). For industry estimates see *IMF 2007 Mortgage Market* at 4. Regulation C's coverage of higher-priced loans is not thought, however, to have reached the prime market in those years. Rather, in both 2005 and 2006 it reached into the alt-A market, which the same source estimated to be 12 percent in 2005 and 13 percent in 2006. In 2004, Regulation C captured a significantly smaller part of the market than an industry estimate of the subprime market (11 percent vs. 19 percent), but that year's HMDA data were somewhat anomalous because of a steep yield curve.

[43] Annual percentage rates were estimated from the contract rates in these data using formulas derived from a separate proprietary database of subprime loans that collects contract rates, points, and annual percentage rates. This separate database, which contains data on the loan originations of eight subprime mortgage lenders, is maintained by the Financial Services Research Program at George Washington University.

pricing characteristics, but in amounts that exceed the threshold for loans eligible for purchase by Freddie Mac or Fannie Mae. The PMMS collects pricing data only on loans eligible for purchase by one of these entities (''conforming loans''). Prime jumbo loans have always had somewhat higher rates than prime conforming loans, but the spread has widened significantly and become much more volatile since August 2007. If this spread remains wider and more volatile when the final rule takes effect, the rule will cover a significant share of transactions that would be prime jumbo loans. While covering prime jumbo loans is not the Board's objective, the Board does not believe that it should set the threshold at a higher level to avoid what may be only temporary coverage of these loans relative to the long time horizon for this rule.

A third example is a request from a trade association for the manufactured housing industry, including lenders specializing in this industry, that the thresholds be set higher for loans secured by dwellings deemed to be personal property. This association pointed to the higher risk creditors bear on these loans compared to loans secured by real property, which makes their rates systematically higher for reasons apart from the risks they pose to consumers. It also maintained that such loans have not been associated with the abusive practices of the subprime market.[44]

Credit risk and liquidity risk can vary by many factors, including geography, property type, and type of loan. This may suggest to some that different thresholds should be applied to different classes of transactions. This approach would make the regulation inordinately complicated and subject it to frequent revision, which would not be in the interest of creditors, investors, or consumers. Although the simpler approach the Board is adopting—just two thresholds, one for first-lien loans and another for subordinate-lien loans—has its disadvantages, the Board believes they are outweighed by its benefits of simplicity and stability.

F. The Timing of Setting the Threshold

The Board proposed to set the threshold for a dwelling-secured mortgage loan as of the application date. Specifically, a creditor would use the Treasury yield as of the 15th of the month preceding the month in which the application is received. The Board noted that inconsistency with Regulation C, which sets the threshold as of the 15th of the month before the rate is locked, could increase regulatory burden. The Board suggested, however, that setting the threshold as of the application date might introduce more certainty, earlier in the application process, to the determination as to whether a potential transaction would be a higher-priced mortgage loan when consummated.

Very few commenters addressed the precise issue. A couple of them specifically advocated using the rate lock date to select the Treasury yield, as in Regulation C, rather than the application date. Subsequent outreach by the Board indicated that there are different views as to which date to use. Some parties prefer the rate lock date because it is more accurate and therefore would minimize coverage of loans that are not intended to be covered and maximize coverage of loans that are intended to be covered. Other parties prefer the application date because they believe it increases the creditor's ability to predict, when underwriting the loan, that the loan is, or is not, covered by § 226.35.

As noted above, the final rule requires the creditor to use the rate lock date, the date the rate is set for the final time before consummation, rather than the application date. Using the application date might increase the predictability of coverage at the time of underwriting. Using the rate lock date would increase the accuracy of coverage at least somewhat. On balance, the Board believes it is more important to maximize coverage accuracy.

G. Proposal To Conform Regulation C (HMDA)

Regulation C, which implements HMDA, requires creditors to report price data on higher-priced mortgage loans. A creditor reports the difference between a loan's annual percentage rate and the yield on Treasury securities having comparable periods of maturity, if that difference is at least three percentage points for first-lien loans or at least five percentage points for subordinate-lien loans. 12 CFR 203.4(a)(12). Many commenters suggested that the Board establish a uniform definition of ''higher-priced mortgage loan'' for purposes of Regulation C and Regulation Z. Having a single definition would reduce regulatory burden and make the HMDA data a more useful tool to evaluate effects of Regulation Z. Moreover, the Board adopted Regulation C's requirement to report certain mortgage loans as being higher-priced with an objective of covering the subprime market and exclude the prime market, and the definition of ''higher-priced mortgage loan'' adopted in this rule better achieves this objective than the definition in Regulation C for the reasons discussed in part VIII.D. Accordingly, in a separate notice published simultaneously with this final rule the Board is proposing to amend Regulation C to apply the same index and threshold adopted in § 226.35(a).

H. Types of Loans Covered Under § 226.35

The Board proposed to apply the protections of § 226.35 to first-lien, as well as subordinate-lien, closed-end mortgage loans secured by the consumer's principal dwelling. This would include home purchase loans, refinancings, and home equity loans. The proposed definition would not cover loans that do not have primarily a consumer purpose, such as loans for real estate investment. The proposed definition also would not cover HELOCs, reverse mortgages, construction-only loans, or bridge loans. In these respects, the rule is adopted as proposed.

Coverage of Home Purchase Loans, Refinancings, and Home Equity Loans

The statutory protections for HOEPA loans are generally limited to closed-end refinancings and home equity loans. *See* TILA Section 103(aa), 15 U.S.C. 1602(aa). The final rule applies the protections of § 226.35 to loans of these types, which have historically presented the greatest risk to consumers. These loans are often made to consumers who have home equity and, therefore, have an existing asset at risk. These loans also can be marketed aggressively by originators to homeowners who may not benefit from them and who, if responding to the marketing and not shopping independently, may have limited information about their options.

The Board proposed to use its authority under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), to apply the protections of § 226.35 to home purchase loans as well. Commenters did not object, and the Board is adopting the proposal. Covering only refinancings of home purchase loans would fail to protect consumers adequately. From 2003 through the first half of 2007, 42 percent of the higher-risk ARMs that came to dominate the subprime market in recent years were extended to

[44] The specific concern of the commenter is with the requirement to escrow, not, apparently, with the other requirements for higher-priced loans. As discussed in part IX.D, the Board is providing creditors two years to comply with the escrow requirement for manufactured home loans.

consumers to purchase a home.[45] Delinquencies on subprime ARMs used for home purchase have risen more sharply than they have for refinancings. Moreover, comments and testimony at the Board's hearings indicate that the problems with abusive lending practices are not confined to refinancings and home equity loans.

Furthermore, consumers who are seeking home purchase loans can face unique constraints on their ability to make decisions. First-time homebuyers are likely unfamiliar with the mortgage market. Homebuyers generally are primarily focused on acquiring a new home, arranging to move into it, and making other life plans related to the move, such as placing their children in new schools. These matters can occupy much of the time and attention consumers might otherwise devote to shopping for a loan and deciding what loan to accept. Moreover, even if the consumer comes to understand later in the application process that an offered loan may not be appropriate, the consumer may not be able to reject the loan without risk of abrogating the sales agreement and losing a substantial deposit, as well as disrupting moving plans.

Limitation to Loans Secured by Principal Dwelling; Exclusion of Loans for Investment

As proposed, § 226.35 protections are limited to loans secured by the consumer's principal dwelling. The Board's primary concern is to ensure that consumers not lose the homes they principally occupy because of unfair, abusive, or deceptive lending practices. The inevitable costs of new regulation, including potential unintended consequences, can most clearly be justified when people's principal homes are at stake.

A loan to a consumer to purchase or improve a second home would not be covered by these protections unless the loan was secured by the consumer's principal dwelling. Loans primarily for a real estate investment purpose also are not covered. This exclusion is consistent with TILA's focus on consumer-purpose transactions and its exclusion in Section 104 of credit primarily for business, commercial, or agricultural purposes. *See* 15 U.S.C. 1603(1). Real estate investors are expected to be more sophisticated than ordinary consumers about the real estate financing process and to have more experience with it, especially if they invest in several properties.

[45] Figure calculated from First American LoanPerformance data.

Accordingly, the need to protect investors is not clear, and in any event is likely not sufficient to justify the potential unintended consequences of imposing restrictions, with civil liability if they are violated, on the financing of real estate investment transactions.

The Board shares concerns that individuals who invest in residential real estate and do not pay their mortgage obligations put tenants at risk of eviction in the event of foreclosure. Regulating the rights of landlords and tenants, however, is traditionally a matter for state and local law. The Board believes that state and local law could better address this particular concern than a Board regulation.

Coverage of Nontraditional Mortgages

Under the final rule, nontraditional mortgage loans, which permit non-amortizing payments or negatively amortizing payments, are covered by § 226.35 if their APRs exceed the threshold. Several consumer and civil rights groups, and others, contended that § 226.35 should cover nontraditional mortgage loans regardless of loan price because of their potential for significant payment shock and other risks that led the federal banking agencies to issue the Nontraditional Mortgage Guidance. The Board does not believe that the enhanced protections of § 226.35 should be applied on the basis of product type, with the limited exception of the narrow exemptions for HELOCs and other loan types the Board is adopting. A rule based on product type would need to be reexamined frequently as new products were developed, which could undermine the market by making the rule less predictable. Moreover, it is not clear what criteria the Board would use to decide which products were sufficiently risky to warrant categorical coverage. The Board believes that other tools such as supervisory guidance provide the requisite flexibility to address particular product types when that becomes necessary.

HELOC Exemption

The Board proposed to exempt HELOCs largely for two reasons. First, the Board noted that most originators of HELOCs hold them in portfolio rather than sell them, which aligns these originators' interests in loan performance more closely with their borrowers' interests. Second, unlike originations of higher-priced closed-end mortgage loans, HELOC originations are concentrated in the banking and thrift industries, where the federal banking agencies can use supervisory authorities to protect borrowers. For example, when inadequate underwriting of HELOCs unduly increased risks to originators and consumers several years ago, the agencies responded with guidance.[46] The Board also pointed to TILA and Regulation Z's special protections for borrowers with HELOCs such as restrictions on changing plan terms.

Several national trade associations and a few large lenders voiced strong support for excluding HELOCs, generally for the reasons the Board cited. Several consumer and civil rights groups disagreed, contending that enough HELOCs are securitized to raise doubts that the originator's interests are sufficiently aligned with the borrower's interests. They maintained that Regulation Z disclosures and limitations for HELOCs are not adequate to protect consumers, and pointed to specific cases in which unaffordable HELOCs had been extended. Other commenters, such as an association of state regulators, agreed that HELOCs should be covered. Commenters offered very few concrete suggestions, however, for how to determine which HELOCs would be covered, such as an index and threshold.

The Board is adopting the proposal for the reasons stated. The Board recognizes, however, that HELOCs present a risk of circumvention. Creditors may seek to evade limitations on closed-end transactions by structuring such transactions as open-end transactions. In § 226.35(b)(5), discussed below in part IX.E, the Board prohibits structuring a closed-end loan as an open-end transaction for the purpose of evading the new rules in § 226.35.

Other Exemptions Adopted

The other proposed exclusions drew limited comment. A couple of commenters expressed support for excluding reverse mortgages while a couple of commenters opposed it. A few large lenders voiced support for excluding construction-only loans. A few commenters voiced support for the exclusion of temporary bridge loans of 12 months or less, and none of the commenters seemed to oppose it. The Board is adopting the proposed exclusions for reverse mortgages, construction-only loans, and temporary or bridge loans of 12 months or less.

[46] Interagency Credit Risk Guidance for Home Equity Lending, SR 05–11 (May 16, 2005), available at *http://www.federalreserve.gov/boarddocs/srletters/2005/sr0511a1.pdf.*; Addendum to Credit Risk Guidance for Home Equity Lending, SR 06–15 (Sept. 29, 2006), available at *http://www.federalreserve.gov/BoardDocs/SRLetters/2006/SR0615a3.pdf.*

Reverse mortgages. The Board is keenly aware of consumer protection concerns raised by the expanding market for reverse mortgages, which are complex and are sometimes marketed with other complex financial products. Unique aspects of reverse mortgages—for example, the borrower's repayment ability is based on the value of the collateral rather than on income—suggest that they should be addressed separately from this final rule. The Board is reviewing this segment of the mortgage market in connection with its comprehensive review of Regulation Z to determine what measures may be required to ensure consumers are protected.

Construction-only loans. Section 226.35 excludes a construction-only loan, defined as a loan solely for the purpose of financing the initial construction of a dwelling, consistent with the definition of a ''residential mortgage transaction'' in § 226.2(a)(24). A construction-only loan does not include the permanent financing that replaces a construction loan. Construction-only loans do not appear to present the same risk of consumer abuse as other loans the proposal would cover. The permanent financing, or a new home-secured loan following construction, would be covered by proposed § 226.35 depending on its APR. Applying § 226.35 to construction-only loans, which generally have higher interest rates than the permanent financing, could hinder some borrowers' access to construction financing without meaningfully enhancing consumer protection

Bridge loans. HOEPA now covers certain bridge loans with rates or fees high enough to make them HOEPA loans. TILA Section 129(l)(1) provides the Board authority to exempt classes of mortgage transactions from HOEPA if the Board finds that the exemption is in the interest of the borrowing public and will apply only to products that maintain and strengthen homeownership and equity protection. 15 U.S.C. 1639(l)(2). The Board believes a narrow exemption for bridge loans from the restrictions of § 226.35, as they apply to HOEPA loans, would be in borrowers' interest and support homeownership.

The final rule, like the proposed rule, gives as an example of a ''temporary or bridge loan'' a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within 12 months. This is not the only potential *bona fide* example of a temporary or bridge loan. The Board does expect, however, that the temporary or bridge loan exemption will be applied narrowly and not to evade or circumvent the regulation. For example, a 12-month loan with a substantial balloon payment would not qualify for the exemption where it was clearly intended to lead a borrower to refinance repeatedly into a chain of 12-month loans.

Exemptions Not Adopted

Industry commenters proposed additional exclusions that the Board is not adopting.

Government-guaranteed loans. Some commenters proposed excluding loans with federal guaranties such as FHA, VA, and Rural Housing Service. They suggested that the federal regulations that govern these loans are sufficient to protect consumers, and that new regulations under HOEPA were not only unnecessary but could cause confusion. At least one commenter also suggested excluding loans with state or local agency guaranties.

The Board does not believe that exempting government-guaranteed loans from § 226.35 is appropriate. It is not clear what criteria the Board would use to decide precisely which government programs would be exempted; commenters did not offer concrete suggestions. Moreover, such exemptions could attract to agency programs less scrupulous originators seeking to avoid HOEPA's civil liability, with serious unintended consequences for consumers as well as for the agencies and taxpayers.

Jumbo loans. A few commenters proposed excluding non-conforming or ''jumbo'' loans, that is, loans that exceed the threshold amount for eligibility for purchase by Fannie Mae or Freddie Mac. They cited a lack of evidence of widespread problems with jumbo loan performance, and a belief that borrowers who can afford jumbo loans are more sophisticated consumers and therefore better able to protect themselves.

The Board does not believe excluding jumbo loans would be appropriate. The request is based on certain assumptions about the characteristics of the borrowers who take out jumbo loans. In fact, jumbo loans are offered in the subprime and alt-A markets and not just in the prime market. A categorical exemption of jumbo loans could therefore seriously undermine protections for consumers, especially in areas with above-average home prices.

Portfolio loans. A commenter proposed excluding loans held in portfolio on the basis that a lender will take more care with these loans. Among other concerns with such an exemption is that it often cannot be determined as of consummation whether a loan will be held in portfolio or sold immediately—or, if held, for how long before being sold. Therefore, such an exception to the rule does not appear practicable and could present significant opportunities for evasion.

IX. Final Rules for Higher-Priced Mortgage Loans and HOEPA Loans

A. Overview

This part discusses the new consumer protections the Board is applying to ''higher-priced mortgage loans'' and HOEPA loans. Creditors are prohibited from extending credit without regard to borrowers' ability to repay from sources other than the collateral itself. The final rule differs from the proposed rule in that it removes the proposed ''pattern or practice'' phrase and adds a presumption of compliance when certain underwriting procedures are followed. Creditors are also required to verify income and assets they rely upon to determine repayment ability, and to establish escrow accounts for property taxes and insurance. In addition, a higher-priced mortgage loan may not have a prepayment penalty except under certain conditions. These conditions are substantially narrower than those proposed.

The Board finds that the prohibitions in the final rule are necessary to prevent practices that the Board finds to be unfair, deceptive, associated with abusive lending practices, or otherwise not in the interest of the borrower. *See* TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), and the discussion of this statute in part V above.

The Board is also adopting the proposed rule prohibiting a creditor from structuring a closed-end mortgage loan as an open-end line of credit for the purpose of evading the restrictions on higher-priced mortgage loans, which do not apply to open-end lines of credit. This rule is based on the authority of the Board under TILA Section 129(l)(2) to prohibit practices that would evade Board regulations adopted under authority of that statute. 15 U.S.C. 1639(l)(2).

B. Disregard of Consumer's Ability To Repay—§§ 226.34(a)(4) and 226.35(b)(1)

TILA Section 129(h), 15 U.S.C. 1639(h), and Regulation Z § 226.34(a)(4) prohibit a pattern or practice of extending credit subject to § 226.32 (HOEPA loans) based on consumers' collateral without regard to their repayment ability. The regulation creates a presumption of a violation where a creditor has a pattern or practice of failing to verify and document repayment ability. The Board proposed to revise the prohibition on disregarding repayment ability and extend it, through proposed § 226.35(b)(1), to higher-priced mortgage loans as defined in § 226.35(a). The proposed revisions included adding several rebuttable presumptions of violations for a pattern or practice of failing to follow certain underwriting procedures, and a safe harbor.

The final rule removes ''pattern or practice'' and therefore prohibits any HOEPA loan or higher-priced mortgage loan from being extended based on the collateral without regard to repayment ability. Verifying repayment ability has been made a requirement rather than a presumptive requirement. The proposal provided that a failure to follow any one of several specified underwriting procedures would create a presumption of a violation. In the final rule, those procedures, with modifications, have instead been incorporated into a presumption of compliance which replaces the proposed safe harbor.

Public Comment

Mortgage lenders and their trade associations that commented generally, but not uniformly, support or at least do not oppose a rule requiring creditors to consider repayment ability. They maintain, however, that the rule as drafted would unduly constrain credit availability because of the combination of potentially significant damages under TILA Section 130, 15 U.S.C. 1640, and a perceived lack of a clear and flexible safe harbor. These commenters stated that two elements of the rule that the Board had intended to help preserve credit availability—the ''pattern or practice'' element and a safe harbor for a creditor having a reasonable expectation of repayment ability for at least seven years—would not have the intended effect. Many of these commenters suggested that the rule would unduly constrain credit unless the Board removed the presumptions of violations and provided a clearer and more specific safe harbor. Some of these commenters also requested additional safe harbors, such as for use of an automated underwriting system (AUS) of Fannie Mae or Freddie Mac.

Consumer, civil rights, and community development groups, as well as some state and local government officials, several members of Congress, a federal regulator, and others argued that ''pattern or practice'' seriously weakened the rule and urged its removal. They maintain that ''pattern or practice'' would effectively prevent an individual borrower from bringing a claim or counter-claim based on his or her loan, and reduce the rule's deterrence of irresponsible lending. These commenters generally support the proposed presumptions of violations but many of them urged the Board to adopt quantitative standards for the proposed presumptions for failing to consider debt-to-income ratios (DTI) and residual income levels. As discussed above, these commenters also would apply the rule to nontraditional mortgages regardless of price, and a few would apply the rule to the entire mortgage market including the prime market.

The comments are discussed in more detail throughout this section as applicable.

Discussion

The Board finds that disregarding a consumer's repayment ability when extending a higher-priced mortgage loan or HOEPA loan, or failing to verify the consumer's income, assets, and obligations used to determine repayment ability, are unfair practices. This section discusses the evidence from recent events of a disregard for repayment ability and reliance on unverified incomes in the subprime market; the substantial injuries that disregarding repayment ability and failing to verify income causes consumers; the reasons consumers cannot reasonably avoid these injuries; and the Board's basis for concluding that the injuries are not outweighed by countervailing benefits to consumers or competition when repayment ability is disregarded or income is not verified.

Evidence of a recent widespread disregard of repayment ability. Approximately three-quarters of securitized originations in subprime pools from 2003 to 2007 were 2–28 or 3–27 ARMs with a built-in potential for significant payment shock at the start of the third or fourth year, respectively.[47] Originations of these types of mortgages during 2005 and 2006 and through early 2007 have contributed significantly to a substantial increase in serious delinquencies and foreclosures. The proportion of all subprime mortgages past-due ninety days or more (''serious delinquency'') was about 13 percent in October 2007, more than double the mid-2005 level.[48] Adjustable-rate subprime mortgages reached a serious delinquency rate of almost 28 percent in May 2008, quintuple the mid-2005 level. The serious delinquency rate has also risen for loans in alt-A (near prime) securitized pools to almost 8 percent (as of April 2008) from less than 2 percent only a year ago. In contrast, 1.5 percent of loans in the prime-mortgage sector were seriously delinquent as of April 2008.

Higher delinquencies have shown through to foreclosures. Foreclosures were initiated on some 1.5 million U.S. homes during 2007, up 53 percent from 2006, and the rate of foreclosure starts looks to be higher yet for 2008. Lenders initiated over 550,000 foreclosures in the first quarter of 2008, about 274,000 of them on subprime mortgages. This was significantly higher than the quarterly average of 440,000 foreclosures in the second half of 2007 and 325,000 in the first half, and twice the quarterly average of 225,000 for the past six years.[49]

Payment increases on 2–28 and 3–27 ARMs have not been a major cause of the increase in delinquencies and foreclosures because most delinquencies occurred before the payments were adjusted. Rather, a major contributor to these delinquencies was lenders' extension of credit on the basis of income stated on applications without verification.[50] Originators had strong incentives to make these ''stated income'' loans, and consumers had incentives to accept them. Because the loans could be originated more quickly, originators, who were paid based on volume, could increase their earnings by originating more of them. The share of ''low doc'' and ''no doc'' loan originations in the securitized subprime market rose from 20 percent in 2000, to 30 percent in 2004, to 40 percent in 2006.[51] The prevalence of stated income lending left wide room for the loan officer, mortgage broker, or consumer to overstate the consumer's income so the consumer could qualify for a larger loan

[47] In a typical case of a 2–28 discounted ARM, a $200,000 loan with a discounted rate of 7 percent for two years (compared to a fully-indexed rate of 11.5 percent) and a 10 percent maximum rate in the third year would start at a payment of $1,531 and jump to a payment of $1,939 in the third year, even if the index value did not increase. The rate would reach the fully-indexed rate in the fourth year (if the index value still did not change), and the payment would increase to $2,152. The example assumes an initial index of 5.5 percent and a margin of 6 percent; assumes annual payment adjustments after the initial discount period; a 3 percent cap on the interest rate increase at the end of year 2; and a 2 percent annual payment adjustment cap on interest rate increases thereafter, with a lifetime payment adjustment cap of 6 percent (or a maximum rate of 13 percent).

[48] Delinquency rates calculated from data from First American LoanPerformance on mortgages in subprime securitized pools. Figures include loans on non-owner-occupied properties.

[49] Estimates are based on data from *MBA Nat'l Delinquency Survey.*

[50] *See* U.S. Gov't Accountability Office, GAO–08–78R, *Information on Recent Default and Foreclosure Trends for Home Mortgages and Associated Economic and Market Developments* 5 (2007); Fannie Mae, *Weekly Economic Commentary* (Mar. 26, 2007).

[51] Figures calculated from First American LoanPerformance data.

and the loan officer or broker could receive a larger commission. There is substantial anecdotal evidence that borrower incomes were commonly inflated.[52]

Lenders relying on overstated incomes to make loans could not accurately assess consumers' repayment ability.[53] Evidence of this failure is found in the somewhat steeper increase in the rate of default for low/no doc loans originated when underwriting standards were declining in 2005 and 2006 relative to full documentation loans.[54] Due in large part to creditors' reliance on inaccurate ''stated incomes,'' lenders often failed to determine reliably that the consumer would be able to afford even the initial discounted payments. Almost 13 percent of the 2–28 ARMs originated in 2005 appear to have become seriously delinquent before their first reset.[55] While some of these borrowers may have been able to make their payments—but stopped because their home values declined and they lost what little equity they had—others were not able to afford even their initial payments.

Although payment shock on 2–28 and 3–27 ARMs did not contribute significantly to the substantial increase in delinquencies, there is reason to believe that creditors did not underwrite to a rate and payment that would take into account the risk to consumers of a payment shock. Creditors also may not have factored in the consumer's obligation for the expected property taxes and insurance, or the increasingly common ''piggyback'' second-lien loan or line of credit a consumer would use to finance part or all of the down payment.

By frequently basing lending decisions on overstated incomes and understated obligations, creditors were in effect often extending credit based on the value of the collateral, that is, the consumer's house. Moreover, by coupling these practices with a practice of extending credit to borrowers with very limited equity, creditors were often extending credit based on an expectation that the house's value would appreciate rapidly.[56] Creditors may have felt that rapid house price appreciation justified loosening their lending standards, but in some locations house price appreciation was fed by loosened standards, which permitted consumers to take out larger loans and bid up house prices. Loosened lending standards therefore made it more likely that the inevitable readjustment of house prices in these locations would be severe.

House price appreciation began to slow in 2006 and house price levels actually began to decline in many places in 2007. Borrowers who could not afford their mortgage obligations because their repayment ability had not been assessed properly found it more difficult to lower their payments by refinancing. They lacked sufficient equity to meet newly tightened lending standards, or they had negative equity, that is, they owed more than their house was worth. For the same reasons, many consumers also could not extinguish their mortgage obligations by selling their homes. Declining house prices led to sharp increases in serious delinquency rates in both the subprime and alt-A market segments, as discussed above.[57]

Although the focus of § 226.35 is the subprime market, it may cover part of the alt-A market. Disregard for repayment ability was often found in the alt-A market as well. Alt-A loans are made to borrowers who typically have higher credit scores than subprime borrowers, but the loans pose more risk than prime loans because they involve small down payments or reduced income documentation, or the terms of the loan are nontraditional. According to one estimate, loans with nontraditional terms that permitted borrowers to defer principal (''interest-only'') or both principal and some interest (''option ARM'') in exchange for higher payments later—reached 78 percent of alt-A originations in 2006.[58] The combination of a variable rate with a deferral of principal and interest held the potential for substantial payment shock within five years. Yet rising delinquency rates to almost 8 percent in 2008, from less than 1 percent in 2006, could suggest that lenders too often assessed repayment ability at a low interest rate and payment that did not adequately account for near-certain payment increases. In addition, these loans typically were made based on reduced income documentation. For example, the share of interest-only mortgages with low or no documentation in alt-A securitized pools increased from around 64 percent in 2003 to nearly 80 percent in 2006.[59] It is generally accepted that the reduced documentation of income led to a high degree of income inflation in the alt-A market just as it did in the subprime market.

Substantial injury. A borrower who cannot afford to make the loan payments as well as payments for property taxes and homeowners insurance because the lender did not adequately assess the borrower's repayment ability suffers substantial injury. Missing mortgage payments is costly: Large late fees are charged and the borrower's credit record is impaired, reducing her credit options. If refinancing to a loan with a lower payment is an option (for example, if the borrower can obtain a loan with a longer maturity), refinancing can slow the rate at which the consumer is able to pay down principal and build equity. The borrower may have to tap home equity to cover the refinancing's closing costs or may have to accept a higher interest rate in exchange for the lender paying the closing costs. If refinancing is not an option, then the borrower and household must make sacrifices to keep the home such as reducing other expenditures or taking additional jobs. If keeping the home is not tenable, the borrower must sell it or endure foreclosure, the costs of which (for example, property maintenance costs, attorneys fees, and other fees passed on to the consumer) will erode any equity

[52] *See* Mortgage Asset Research Inst., Inc., *Eighth Periodic Mortgage Fraud Case Report to the Mortgage Bankers Association* (2006) (reporting that 90 of 100 stated income loans sampled used inflated income when compared to tax return data); Fitch Ratings, *Drivers of 2006 Subprime Vintage Performance* (November 13, 2007) *(Fitch 2006 Subprime Performance)* (reporting that stated income loans with high combined loan to value ratios appear to have become vehicles for fraud).

[53] Consumers may also have been led to pay more for their loans than they otherwise would. There is generally a premium for a stated income loan. An originator may not have sufficient incentive to disclose the premium on its own initiative because collecting and reviewing documents could slow down the origination process, reduce the number of loans an originator produces in a period, and, therefore, reduce the originator's compensation for the period. Consumers who are unaware of this premium are effectively deprived of an opportunity to shop for a potentially lower-rate loan requiring full documentation.

[54] Determined from First American LoanPerformance data. *See also Fitch 2006 Subprime Performance* (stating that lack of income verification, as opposed to lack of employment or down payment verification, caused 2006 low documentation loans delinquencies to be higher than earlier vintages' low documentation loans).

[55] Figure calculated from First American LoanPerformance data.

[56] Often the lender extended credit knowing that the borrower would have no equity after taking into account a simultaneous second-lien (''piggyback'') loan. According to *Fitch 2006 Subprime Performance,* first-lien loans in subprime securitized pools with simultaneous second liens rose from 1.1 percent in 2000 to 6.4 percent in 2003 to 30 percent in 2006. Moreover, in some cases the appraisal the lender relied on overstated borrower equity because the lender or broker pressured the appraiser to inflate the house value. The prohibition against coercing appraisers is discussed below in part X.B.

[57] Estimates are based on data from *MBA Nat'l Delinquency Survey.*

[58] David Liu and Shumin Li, *Alt-A Credit—The Other Shoe Drops?,* The MarketPulse (First American LoanPerformance, Inc., San Francisco, Cal.) Dec. 2006.

[59] Figures calculated from First American LoanPerformance data.

the consumer had. The foreclosure will mar the consumer's credit record and make it very difficult for the consumer to become a homeowner again any time soon. Many borrowers end up owing the lender more than the house is worth, especially if their homes are sold into a declining market as is happening today in many parts of the country. Foreclosures also may force consumers to move, which is costly and disruptive. In addition to the financial costs of unsustainable lending practices, borrowers and households can suffer serious emotional hardship.

If foreclosures due to irresponsible lending rise rapidly or reach high levels in a particular geographic area, then the injuries can extend beyond the individual borrower and household to the larger community. A foreclosure cluster in a neighborhood can reduce homeowner equity throughout the neighborhood by bringing down prices, eroding the asset that for many households is their largest.[60] A significant rise in foreclosures can create a cycle where foreclosures bring down property values, reducing the ability and incentive of homeowners, particularly those under stress for other reasons, to retain their homes. Foreclosure clusters also can lower municipal tax revenues, reducing a locality's ability to maintain services and make capital investments. At the same time, revenues may be diverted to mitigating hazards that clusters of vacant homes can create.[61]

Lending without regard to repayment ability also has other consequences. It facilitates an abusive strategy of ''flipping'' borrowers in a succession of refinancings designed ostensibly to lower borrowers' burdensome payments that actually convert borrowers' equity into fees for originators without providing borrowers a benefit. Moreover, relaxed standards, such as those that pervaded the subprime market recently, may increase the incidence of abusive lending practices by attracting less scrupulous originators into the market while at the same time bringing more vulnerable borrowers into the market. The rapid influx of new originators that can accompany a relaxation of lending standards makes it more difficult for regulators and investors alike to distinguish responsible from irresponsible actors. *See* supra part II.

Injury not reasonably avoidable. One might assume that borrowers could avoid unsustainable loans by comparing their current and expected incomes to their current and expected expenses, including the scheduled loan payments disclosed under TILA and an estimate of property taxes and homeowners insurance. There are several reasons, however, why consumers, especially in the subprime market, accept risky loans they will struggle or fail to repay. In some cases, originators mislead borrowers into entering into unaffordable loans by understating the payment before closing and disclosing the true payment only at closing (''bait and switch''). At the closing table, many borrowers may not notice the disclosure of the payment amount or have time to consider it because borrowers are typically provided with many documents to sign then. Borrowers who consider the disclosure may nonetheless feel constrained to close the loan, for a number of reasons. They may already have paid substantial fees and expect that more applications would require more fees. They may have signed agreements to purchase a new house and sell the current house. Or they may need to escape an overly burdensome payment on a current loan, or urgently need the cash that the loan will provide for a household emergency.

Furthermore, many consumers in the subprime market will accept loans knowing they may have difficulty affording the payments because they reasonably believe a more affordable loan will not be available to them. As explained in part II.B, limited transparency of prices, products, and originator incentives reduces a borrower's expected benefit from shopping further for a better option. Moreover, taking more time to shop can be costly, especially for the borrower in a financial pinch. Thus, borrowers often make a reasoned decision to accept unfavorable terms.

Furthermore, borrowers' own assessment of their repayment ability may be influenced by their belief that a lender would not provide credit to a consumer who did not have the capacity to repay. Borrowers could reasonably infer from a lender's approval of their applications that the lender had appropriately determined that they would be able to repay their loans. Borrowers operating under this impression may not independently assess their repayment ability to the extent necessary to protect themselves from taking on obligations they cannot repay. Borrowers are likely unaware of market imperfections that may reduce lenders' incentives to fully assess repayment ability. See part II.B. And borrowers would not realize that a lender was applying loose underwriting standards such as assessing repayment ability on the basis of a ''teaser'' payment. In addition, originators may sometimes encourage borrowers to be excessively optimistic about their ability to refinance should they be unable to sustain repayment. For example, they sometimes offer reassurances that interest rates will remain low and house prices will increase; borrowers may be swayed by such reassurances because they believe the sources are experts.

Stated income and stated asset loans can make it even more difficult for a consumer to avoid an unsustainable loan. With stated income (or stated asset) loans, the applicant may not realize that the originator is inflating the applicant's income and assets to qualify the applicant for the loan. Applicants do not necessarily even know that they are being considered for stated income or stated asset loans. They may give the originator documents verifying their income and assets that the originator keeps out of the loan file because the documents do not demonstrate the income and assets needed to make the loan. Moreover, if a consumer knowingly applies for a stated income or stated asset loan and correctly states her income or assets, the originator can write an inflated figure into the application form. It is typical for the originator to fill out the application for the consumer, and the consumer may not see the written application until closing, when the borrower often is provided with numerous documents to review and sign and may not review the application form with care. The consumer who detects the inflated numbers at the closing table may not realize their importance or may face constraints that make it particularly difficult to walk away from the table without the loan.

Some consumers may also overstate their income or assets with the encouragement of a loan originator who makes it clear that the consumer's actual income or assets are not high enough to qualify them for the loans they seek. Such originators may reassure applicants that this is a benign and common practice. In addition, applicants may inflate their incomes and assets on their own initiative in circumstances where the originator does not have reason to know.

For all of these reasons, borrowers cannot reasonably avoid injuries from lenders' disregard of repayment ability.

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[60] *E.g.,* Zhenguo Lin, et al. *Spillover Effects of Foreclosures on Neighborhood Property Values,* Journal of Real Estate Finance and Economics Online (Nov. 2007), available at *http://www.springerlink.com/content/rk4q0p4475vr3473/fulltext.pdf.*

[61] *E.g.,* William C. Apgar and Mark Duda. *Collateral Damage: The Municipal Impact of Today's Mortgage Foreclosure Boom* (Minneapolis: Homeownership Preservation Foundation 2005).

Moreover, other consumers who are not parties to irresponsible transactions but suffer from their spillover effects have no ability to prevent these injuries.

Injury not outweighed by countervailing benefits to consumers or to competition. There is no benefit to consumers or competition from loans that are extended without regard to consumers' ability to make even the initial payments. There may be some benefit to consumers from loans that are underwritten based on the collateral and without regard to consumers' ability to sustain their payments past some initial period. For example, a consumer who has lost her principal source of income may benefit from being able to risk her home and her equity in the hope that, before she exhausts her savings, she will obtain a new job that will generate sufficient income to support the payment obligation. The Board believes, however, that this rare benefit is outweighed by the substantial costs to most borrowers and communities of extending higher-risk loans without regard to repayment ability. (Adopting exceptions to the rule for hardship cases would create significant potential loopholes and make the rule unduly complex. The final rule does, however, contain an exemption for temporary or ''bridge'' loans of 12 months or less, though this exemption is intended to be construed narrowly.)

The Board recognizes as well that stated income (or stated asset) lending has at least three potential benefits for consumers and competition. It may speed credit access for consumers who need credit on an emergency basis, save some consumers from expending significant effort to document their income, and provide access to credit for consumers who cannot document their incomes. The first two benefits are limited relative to the substantial injuries caused by lenders' relying on unverified incomes. The third benefit is also limited given that consumers who file proper tax returns can use at least these documents, if no others are available, to verify their incomes. Among higher-priced mortgage loans, where risks to consumers are already elevated, the potential benefits to consumers of stated income/stated asset lending are outweighed by the potential injuries to consumers and competition.

Final Rule

HOEPA and § 226.34(a)(4) currently prohibit a lender from engaging in a pattern or practice of extending HOEPA loans based on the consumer's collateral without regard to the consumer's repayment ability, including the consumer's current and expected income, current obligations, and employment. Section 226.34(a)(4) currently provides that a creditor is presumed to have violated this prohibition if it engages in a pattern or practice of failing to verify repayment ability.

The Board proposed to extend this prohibition to higher-priced mortgage loans, *see* proposed § 226.35(b)(1), and to add several additional rebuttable presumptions of violation as well as a safe harbor. Under the proposal a creditor would have been presumed to violate the regulation if it engaged in a pattern or practice of failing to consider: consumers' ability to pay the loan based on the interest rate specified in the regulation (§ 226.34(a)(4)(i)(B)); consumers' ability to make fully-amortizing loan payments that include expected property taxes and homeowners insurance (§ 226.34(a)(4)(i)(C)); the ratio of borrowers' total debt obligations to income as of consummation (§ 226.34(a)(4)(i)(D)); and borrowers' residual income (§ 226.34(a)(4)(i)(E)). The proposed safe harbor appeared in § 226.34(a)(4)(ii), which provided that a creditor does not violate § 226.34(a)(4) if the creditor has a reasonable basis to believe that consumers will be able to make loan payments for at least seven years, considering each of the factors identified in § 226.34(a)(4)(i) and any other factors relevant to determining repayment ability.

The final rule removes the ''pattern or practice'' qualification and therefore prohibits a creditor from extending any HOEPA loan or higher-priced mortgage loan based on the collateral without regard to repayment ability. Like the proposal, the final rule provides that repayment ability is determined according to current and reasonably expected income, employment, assets other than the collateral, current obligations, and mortgage-related obligations such as expected property tax and insurance obligations. *See* § 226.34(a)(4) and (a)(4)(i); § 226.35(b)(1). The final rule also shifts the proposed new presumptions of violations to a presumption of compliance, with modifications. The presumption of compliance is revised to specify a finite set of underwriting procedures; the reference to ''any other factors relevant to determining repayment ability'' has been removed. *See* § 226.34(a)(4)(iii). The presumption of violation for failing to verify repayment ability currently in § 226.34(a)(4)(i), however, is being finalized instead as an explicit requirement to verify repayment ability. *See* § 226.34(a)(4)(ii). This section discusses the basic prohibition, and ensuing sections discuss the removal of pattern or practice, the verification requirement, and the presumption of compliance.

As discussed above, the Board finds extending higher-priced mortgage loans or HOEPA loans based on the collateral without regard to the consumer's repayment ability to be an unfair practice. The final rule prohibits this practice. The Board also took into account state laws that declare extending loans to consumers who cannot repay an unfair practice.[62]

Section 226.34(a)(4) governs the process for extending credit; it is not intended to dictate which types of credit or credit terms are permissible and which are not. The rule does not prohibit potentially riskier types of loans such as loans with balloon payments, loans with interest-only payments, or ARMs with discounted initial rates. With proper underwriting, such products may be appropriate for certain borrowers in the subprime market. The regulation merely prohibits a creditor from extending such products or any other higher-priced mortgage loans without adequately evaluating repayment ability.

The rule is intended to ensure that creditors do not assess repayment ability using overstated incomes or understated payment obligations. The rule explicitly requires that the creditor verify income and assets using reliable third party documents and, therefore, prohibits relying merely on an income statement from the applicant. *See* § 226.34(a)(4)(ii). (This requirement is discussed in more detail below.) In addition, the rule requires assessing not just the consumer's ability to pay loan principal and interest, but also the consumer's ability to pay property taxes, homeowners insurance, and similar mortgage-related expenses. Mortgage-related expenses, such as homeowner's association dues or condominium or cooperative fees, are included because failure to pay them could result in a consumer's default on his or her mortgage (if, for example, failure to pay resulted in a senior lien on the unit that constituted a default under the terms of the consumer's mortgage obligations). *See* §§ 226.34(a)(4); 226.34(a)(4)(i).

As of consummation. The final rule provides, as did the proposed rule, that the creditor is responsible for assessing repayment ability as of consummation. Two industry trade associations expressed concern over proposed

[62] *See, e.g.*, Ind. Code §§ 24–4.5–6–102, 24–4.5–6–111(l)(3); Mass. Gen. Laws ch. 93A, ch. 183 §§ 4, 18(a); W.V. Code § 46A–7–109(3)(a).

comment 34(a)(4)-2, indicating that, while a creditor would be liable only for what it knew or should have known as of consummation, events after consummation may be relevant to determining compliance. These commenters contend that creditors should not be held responsible for accurately predicting future events such as a borrower's employment stability or house price appreciation. One asserted that the rule would lead creditors to impose more stringent underwriting criteria in geographic areas with economies projected to decline. These commenters requested that the Board clarify in the commentary that post-closing events cannot be used to second-guess a lender's underwriting decision, and one requested that the commentary specifically state that a foreclosure does not create a presumption of a violation.

The Board has revised the comment, renumbered as 34(a)(4)-5, to delete the statement that events after consummation may be relevant to determining whether a creditor has violated § 226.34(a)(4), but events after consummation do not, by themselves, establish a violation. Post-consummation events such as a sharp increase in defaults could be relevant to showing a ''pattern or practice'' of disregarding repayment ability, but the final rule does not require proof of a pattern or practice. The final comment retains the proposed statement that a violation is not established if borrowers default because of significant expenses or income losses that occur after consummation. The Board believes it is clear from the regulation and comment that a default does not create a presumption of a violation.

Income, assets, and employment. The final rule, like the proposal, provides that sources of repayment ability include current and reasonably expected income, employment, and assets other than the collateral. For the sake of clarity, new comment 34(a)(4)-2 indicates that a creditor may base its determination of repayment ability on current or reasonably expected income, on assets other than the collateral, or both. A creditor that purported to determine repayment ability on the basis of information other than income or assets would have to clearly demonstrate that this information is probative of repayment ability.

The Board is not adopting the suggestion from several commenters to permit creditors to consider, when determining repayment ability, other characteristics of the borrower or the transaction such as credit score and loan-to-value ratio. These other characteristics may be critical to responsible mortgage underwriting, but they are not as probative as income and assets of the consumer's ability to make the scheduled payments on a mortgage obligation. For example, if a consumer has income of $3,000 per month, it is very unlikely that the consumer will be able to afford a monthly mortgage payment of $2,500 per month regardless of the consumer's credit score or loan-to-value ratio. Moreover, incorporating these other characteristics in the regulation would potentially create a major loophole for originators to discount the importance of income and assets to repayment ability. For the same reasons, the Board also is not adopting the suggestion of some commenters to permit a creditor to rely on any factor that the creditor finds relevant to determine credit or delinquency risk.

The final rule, like the proposal, provides broad flexibility as to the types of income, assets, and employment a creditor may rely on. Specific references to seasonal and irregular employment were added to comment 34(a)(4)–6 (numbered 34(a)(4)–3 in the proposal) in response to requests from commenters. References to several different types of income, such as interest and dividends, were also added. These examples are merely illustrative, not exhaustive.

The final rule and commentary also follow the proposal in permitting a lender to rely on expected income and employment, not just current income and employment. Expectations for improvements in employment or income must be reasonable and verified with third party documents. The commentary gives examples of expected bonuses verified with documents demonstrating past bonuses, and expected employment verified with a commitment letter from the future employer stating a specified salary. *See* comment 34(a)(4)(ii)–3. In some cases a loan may have a likely payment increase that would not be affordable at the borrower's income as of consummation. A creditor may be able to verify a reasonable expectation of an increase in the borrower's income that will make the higher payment affordable to the borrower.

Several commenters expressed concern over language in proposed comment 34(a)(4)–3 indicating that creditors are required, not merely allowed, to consider information about expected changes in income or employment that would undermine repayment ability. The proposed comment gave as an example that a creditor must consider information indicating that an employed person will become unemployed. Some commenters contended that it is appropriate to permit lenders to consider expected income or employment, but inappropriate to require that they do so. Creditors are concerned that they would be liable for accurately assessing a borrower's employment stability, which may depend on regional economic factors.

The final comment, renumbered as 34(a)(4)–5, is revised somewhat to address this concern. The revised comment indicates that a creditor might have knowledge of a likely reduction in income or employment and provides the following example: a consumer's written application indicates that the consumer plans to retire within twelve months or transition from full-time to part-time employment. As the example indicates, the Board does not intend to place unrealistic requirements on a creditor to speculate or inquire about every possible change in a borrower's life circumstances. The sentence ''a creditor may have information indicating that an employed person will become unemployed'' is deleted as duplicative.

Finally, new comment 34(a)(4)–7 addresses the concern of several commenters that the proposal appeared to require them to make inquiries of borrowers or consider information about them that Regulation B, 12 CFR part 202, would prohibit, such as a question posed solely to a female applicant as to whether she is likely to continue her employment. The comment explains that § 226.34(a)(4) does not require or permit the creditor to make inquiries or verifications that would be prohibited by Regulation B.

Obligations. The final rule, like the proposed rule, requires the creditor to consider the consumer's current obligations as well as mortgage-related obligations such as expected property tax and required insurance. *See* § 226.34(a)(4)(i). The final rule does not contain the proposed rule's reference to ''expected obligations.'' An industry trade association suggested the reference would stifle communications between a lender and a consumer because the lender would seek to avoid eliciting information about the borrower's plans for future indebtedness, such as an intention to take out student loans to send children to college. The Board agrees that the proposal could stifle communications. This risk does not have a sufficient offsetting benefit because it is by nature speculative whether a mortgage borrower will undertake other credit obligations in the future.

A reference to simultaneous mortgage obligations (proposed comment 34(a)(4)(i)–2)) has been retained but revised. *See* comment 34(a)(4)–3. Several commenters objected to the proposed comment. They suggested a lender has a limited ability to identify the existence of a simultaneous obligation with an unaffiliated lender if the borrower does not self-report. They asked that the requirement be restricted to simultaneous obligations with the same lender, or that it be limited to obligations the creditor knows or has reason to know about, or that it have a safe harbor for a lender that has procedures to prevent consumers from obtaining a loan from another creditor without the lender's knowledge. The comment has been revised to indicate that the regulation makes a creditor responsible for considering only those simultaneous obligations of which the creditor has knowledge.

Exemptions. The Board is adopting the proposed exemptions from the rule for bridge loans, construction-only loans, reverse mortgages, and HELOCs. These exemptions are discussed in part VIII.H. A national bank and two trade associations with national bank members requested an additional exemption for national banks that are in compliance with OCC regulation 12 CFR 34.3(b). The OCC regulation prohibits national banks from making a mortgage loan based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral without regard to the borrower's ability to repay the loan according to its terms. Unlike HOEPA, however, the OCC regulation does not authorize private actions or actions by state attorneys general when the regulation is violated. Thus, the Board is not adopting the requested exemption.

Pattern or Practice

Based on the comments and additional information gathered by the Board, the Board is adopting the rule without the phrase ''pattern or practice.'' The rule therefore prohibits an individual HOEPA loan or higher-priced mortgage loan from being extended based on the collateral without regard to repayment ability. TILA Section 129(l)(2), 15 U.S.C. 1638(l)(2), confers on the Board authority to revise HOEPA's restrictions on HOEPA loans if the Board finds that such revisions are necessary to prevent unfair or deceptive acts or practices in connection with mortgage loans. The Board so finds for the reasons discussed below.

Public comment. Consumer advocates and others strongly urged the Board to remove the pattern or practice element. They argued that the burden to prove a pattern or practice is so onerous as to make it impracticable for an individual plaintiff to seek relief, either affirmatively or in recoupment. They suggested a typical plaintiff does not have the resources to obtain information about a lender's loans and loan policies sufficient to allege a pattern or practice. Moreover, should a plaintiff be able to allege a pattern or practice and proceed to the discovery stage, one legal aid organization commented based on direct experience that a creditor may produce a mountain of documents that overwhelms the plaintiff's resources and makes it impractical to pursue such cases. One consumer group argued that the proposed rule would not adequately deter abuse because, by the time a pattern or practice emerged, substantial harm would already have been done to consumers and investors. This commenter also argued that other TILA provisions give creditors sufficient protection against litigation risk, such as the cap on class action damages, the right to cure certain errors creditors discover on their own, and the defense for *bona fide* errors.

Several lenders and lender trade associations expressed concern that ''pattern or practice'' is too vague to provide the certainty creditors seek and asked for more specific guidance and examples. Other industry commenters contended that the phrase was likely to be interpreted to hold lenders that originate large numbers of loans liable for errors in assessing repayment ability in just a small fraction of their originations. For example, one large lender pointed out that an error rate of 0.5 percent in its 400,000 HMDA-reportable originations in 2006 would have amounted to 2,000 loans. Several commenters cited cases decided under other statutes holding that a mere handful of instances were a pattern or practice. To address these concerns, two commenters requested that the phrase be changed to ''systematic practice'' and that this new phrase be interpreted to mean willful or reckless disregard. Industry commenters generally preferred that ''pattern or practice,'' whatever its limitations, be retained as a form of protection against unwarranted litigation.

Discussion. The Board believes that removing ''pattern or practice'' is necessary to ensure a remedy for consumers who are given unaffordable loans and to deter irresponsible lending, which injures not just individual borrowers but also their neighbors and communities. The Board further believes that the presumption of compliance the Board is adopting will provide more certainty to creditors than either ''pattern or practice'' or the proposed safe harbor. The presumption will better aid creditors with compliance planning, and it will better help them mitigate litigation risk. In short, the Board believes that removing ''pattern or practice'' and providing creditors a presumption of compliance will be more effective to prevent unfair practices, remedy them when they occur, and preserve access to credit.

Imposing the burden to prove ''pattern or practice'' on an individual borrower would leave many borrowers without a remedy under HOEPA for loans that were made without regard to repayment ability. Borrowers would not have a HOEPA remedy for individual, unrelated loans made without regard to repayment ability, of which there could be many in the aggregate. Even if an unaffordable loan was part of a pattern or practice, the individual borrower and his or her attorney would not necessarily have that information.[63] By the time information about a particular lender's pattern or practice of unaffordable lending became widespread, the lender could have caused great injury to many borrowers, as well as to their neighbors and communities. In addition, imposing a ''pattern or practice'' requirement on HOEPA loans, but not higher-priced mortgage loans, would create an anomaly.

Moreover, a ''pattern or practice'' claim can be costly to litigate and might not be economically feasible except as part of a class action, which would not assure individual borrowers of adequate remedies. Class actions can take years to reach a settlement or trial, while the individual borrower who is facing foreclosure because of an unaffordable loan requires a speedy resolution if the borrower is to keep the home. Moreover, lower-income homeowners are often represented by legal aid organizations, which are barred from bringing class actions if they accept funds from the Legal Services Corporation.[64]

To be sure, many borrowers who would be left without a HOEPA remedy for an unaffordable loan may have remedies under state laws that lack a ''pattern or practice'' requirement. In some cases, however, state law remedies would be inferior or unavailable. Moreover, state laws do not assure consumers uniform protection because these laws vary considerably and

[63] Federal rules of civil procedure require that a defendant's motion to dismiss be granted unless the plaintiff alleged sufficient facts to make a pattern or practice ''plausible.'' *Bell Atlantic* v. *Twombly*, 127 S. Ct. 1955 (2007). Many states follow the federal rules.

[64] 45 CFR 1617.3.

generally may not cover federally chartered depository institutions (due to federal preemption) or state chartered depository institutions (due to specific exemptions or general ''parity laws'').

For these reasons, imposing the burden to prove ''pattern or practice'' on an individual borrower would leave many borrowers with a lesser remedy, or without any remedy, for loans made without regard to repayment ability. Removing this burden would not only improve remedies for individual borrowers, it would also increase deterrence of irresponsible lending. Individual remedies impose a more immediate and more certain cost on violators than either class actions or actions by state or federal agencies, which can take years and, in the case of the agencies, are subject to resource constraints. Increased deterrence of irresponsible lending practices should benefit not just borrowers who might obtain higher-priced mortgage loans but also their neighbors and communities who would otherwise suffer the spillover effects of such practices.

The Board acknowledges the legitimate concerns that lenders have expressed over litigation costs. As the Board indicated with the proposal, it proposed ''pattern or practice'' out of a concern that creating civil liability for an originator that fails to assess repayment ability on any individual loan could inadvertently cause an unwarranted reduction in the availability of mortgage credit to consumers. After further study, however, the Board believes that any increase in litigation risk would be justified by the substantial benefits of a rule that provided remedies to individual borrowers. While unwarranted litigation may well increase, the Board believes that several factors will mitigate this cost. In particular, TILA imposes a one-year statute of limitations on affirmative claims, after which only recoupment and set-off are available; HOEPA limits the strict assignee liability of TILA Section 131(d), 15 U.S.C. 1641(d) to HOEPA loans; many defaults may be caused by intervening events such as job loss rather than faulty underwriting; and plaintiffs (or their counsel) may bear a substantial cost to prove a claim of faulty underwriting, which would often require substantial discovery and expert witnesses. Creditors could further contain litigation risk by using the procedures specified in the regulation that earn the creditor a presumption of compliance.

The Board has also considered the possibility that the statute's ''pattern or practice'' element allows creditors an appropriate degree of flexibility to extend occasional collateral-based HOEPA loans to consumers who truly need them and clearly understand the risks involved. Removing ''pattern or practice'' would eliminate this potential consumer benefit. Based on industry comments, however, the benefit is more theoretical than real. While industry commenters may prefer retaining ''pattern or practice'' as a barrier to individual suits, these commenters indicated that ''pattern or practice'' is too vague to be useful for compliance planning. Therefore, retaining ''pattern or practice'' would not likely lead a creditor to extend legitimate collateral-based loans except, perhaps, a trivial number such as one per year.

The Board reached this conclusion only after exploring ways to provide more clarity as to the meaning of ''pattern or practice.'' Existing comment 34(a)(4)–2 provides that a pattern or practice depends on the totality of the circumstances in the particular case; can be established without the use of a statistical process and on the basis of an unwritten lending policy; and cannot be established with isolated, random, or accidental acts. Although this comment has been in effect for several years, its effectiveness is impossible to assess because the market for HOEPA loans shrank to near insignificance soon after the comment was adopted.[65] On its face, however, the guidance removes little of the uncertainty surrounding the meaning of ''pattern or practice.'' (There is only one reported decision to interpret ''pattern or practice'' under HOEPA, *Newton* v. *United Companies Financial Corp.,* 24 F. Supp. 2d 444 (E.D. Pa. 1998), and it has limited precedential value in light of later-adopted comment 34(a)(4)–2.) The Board re-proposed the comment but commenters provided few concrete suggestions for making the rule clearer and the suggestions that were offered would have left a large degree of uncertainty.

The Board considered other potential sources of guidance on ''pattern or practice'' from other statutes and regulations. Case law is of inherently limited value for such a contextual inquiry. Moreover, there are published court decisions, some cited by industry commenters, that suggest that even a few instances could be considered to meet this standard.[66] The Board also consulted informal guidance interpreting ''pattern or practice'' under ECOA.[67] The Board carefully considered how it could adapt this guidance to § 226.34(a)(4). Based on its efforts, the Board concluded that, while additional guidance could reduce some uncertainty, it would necessarily leave substantial uncertainty. The Board further concluded that significantly more certainty could be provided through the ''presumption of compliance'' the final rule provides for following enumerated underwriting practices. *See* § 226.34(a)(4)(iii), discussed below.

Verification of Repayment Ability

Section 226.34(a)(4) currently contains a provision creating a rebuttable presumption of a violation where a lender engages in a pattern or practice of making HOEPA loans without verifying and documenting repayment ability. The Board proposed to retain this presumption and extend it to higher-priced mortgage loans. The final rule is different in two respects. First, as discussed above, the final rule does not contain a ''pattern or practice'' element. Second, it makes verifying repayment ability an affirmative requirement, rather than making failure to verify a presumption of a violation.

In the final rule, the regulation applies the verification requirement to current obligations explicitly, *see* § 226.34(a)(4)(ii)(C); in the proposal, an explicit reference to obligations was in a staff comment. *See* proposed comment 34(a)(4)(i)(A)–2, 73 FR at 1732. The requirement to verify income and assets in final § 226.34(a)(4)(ii)(A) is essentially identical to the requirement of proposed § 226.35(b)(2). Under § 226.34(a)(4)(ii)(A), creditors must verify assets or income, including expected income, relied on in approving an extension of credit using third-party documents that provide reasonably reliable evidence of the income or assets. The final rule, like that proposed, includes an affirmative defense for a creditor that can show that the amounts of the consumer's income or assets relied on were not materially greater than the amount the creditor could have verified at consummation.

Public comment. Many, but by no means all, financial institutions, mortgage brokers, and mortgage industry trade groups that commented support a verification requirement. They raised concerns, however, that the particular requirement proposed would

[65] By 2004, HOEPA loans reported under HMDA were less than one percent of the mortgage market. The Board does not believe the market's contraction can be traced to the guidance on pattern or practice.

[66] *See, e.g., United States* v. *Balistrieri*, 981 F.2d 916, 929–30 (7th Cir. 1992); *United States* v. *Pelzer Realty Co., Inc.*, 484 F.2d 438, 445 (5th Cir. 1973).

[67] Board Policy Statement on Enforcement of the Equal Credit Opportunity and Fair Housing Acts, Q9.

restrict or eliminate access to credit for some borrowers, especially the self-employed, those who earn irregular commission- or cash-based incomes, and low- and moderate-income borrowers. Consumer and community groups and government officials generally supported the proposed verification requirement, with some suggesting somewhat stricter requirements. Many of these same commenters, however, contended the proposed affirmative defense would be a major loophole and urged its elimination. The comments are discussed in further detail below as applicable.

Discussion. For the reasons discussed above, the Board finds that it is unfair not to verify income, assets, and obligations used to determine repayment ability when extending a higher-priced mortgage loan or HOEPA loan. The Board is finalizing the rule as proposed and incorporating it directly into § 226.34(a)(4), where it replaces the proposed presumption of a violation for a creditor that has a pattern or practice of failing to verify repayment ability. ''Pattern or practice'' has been removed and the presumption has been made a requirement. The legal effect of this change is that the final rule, unlike the proposal, would rarely, if ever, permit a creditor to make even isolated ''no income, no asset'' loans (loans made without regard to income and assets) in the higher-priced mortgage loan market. For the reasons explained above, however, the Board does not believe this legal change will reduce credit availability; nor will it affect the availability of ''no income, no asset'' loans in the prime market.

As discussed above, relying on inflated incomes or assets to determine repayment ability often amounts to disregarding repayment ability, which causes consumers injuries they often cannot reasonably avoid. By requiring verification of income and assets, the final rule is intended to limit these injuries by reducing the risk that higher-priced mortgage loans will be made on the basis of inflated incomes or assets.[68] The Board believes the rule is sufficiently flexible to keep costs to consumers, such as any additional time needed to close a loan or costs for obtaining documentation, at reasonable levels relative to the expected benefits of the rule.

The rule specifically authorizes a creditor to rely on W–2 forms, tax returns, payroll receipts, and financial institution records such as bank statements. These kinds of documents are sufficiently reliable sources of information about borrowers' income and assets that the Board believes it is appropriate to provide a safe harbor for their use. Moreover, most consumers can, or should be able to, produce one of these kinds of documents with little difficulty. For other consumers, the rule is quite flexible. It permits a creditor to rely on any third-party document that provides reasonably reliable evidence of the income or assets relied on to determine repayment ability. Examples include check-cashing or remittance receipts or a written statement from the consumer's employer. *See* comment 34(a)(4)(ii)(A)–3. These examples are only illustrative, not limiting. The one type of document that is excluded is a statement only from the consumer.

Many commenters suggested that the Board require creditors to collect the ''best and most appropriate'' documentation. The Board believes that the costs of such a requirement would outweigh the benefits. The vagueness of the suggested standard could make creditors reluctant to accept nontraditional forms of documentation. Nor is it clear how creditors would verify that a form of documentation that might be best or most appropriate was not available.

The commentary has been revised to clarify several points. *See* comments 34(A)(4)(ii)(A)–3 and –4. Oral information from a third party would not satisfy the rule, which requires documentation. Creditors may, however, rely on a letter or an e-mail from the third party. Creditors may also rely on third party documentation the consumer provides directly to the creditor. Furthermore, as interpreted by the comments, the rule excludes documents that are not specific to the consumer. It would not be sufficient to look at average incomes for the consumer's stated profession in the region where the consumer lives or average salaries for employees of the consumer's employer. The commentary has been revised, however, to indicate that creditors may use third party information that aggregates individual-specific data about consumers' income, such as a database service used by an employer to centralize income verification requests, so long as the information is reasonably current and accurate and identifies the specific consumer's income.

The rule does not require creditors that have extended credit to a consumer and wish to extend new credit to the same consumer to re-collect documents that the creditor previously collected from the consumer, if the creditor believes the documents would not have changed since they were initially verified. *See* comment 34(a)(4)(ii)(A)–5. For example, if the creditor has collected the consumer's 2006 tax return for a May 2007 loan, and the creditor makes another loan to that consumer in August 2007, the creditor may rely on the 2006 tax return.

Nor does the rule require a creditor to verify amounts of income or assets the creditor is not relying on to determine repayment ability. For example, if a creditor does not rely on a part of the consumer's income, such as an annual bonus, in determining repayment ability, the creditor would not need to verify the consumer's bonus. A creditor may verify an amount of income or assets less than that stated in the loan file if adequate to determine repayment ability. If a creditor does not verify sufficient amounts to support a determination that the consumer has the ability to pay the loan, however, then the creditor risks violating the regulation.

Self-employed borrowers. The Board has sought to address commenters' concerns about self-employed borrowers. The rule allows for flexibility in underwriting standards so that creditors may adapt their underwriting processes to the needs of self-employed borrowers, so long as creditors comply with § 226.34(a)(4). For example, the rule does not dictate how many years of tax returns or other information a creditor must review to determine a self-employed applicant's repayment ability. Nor does the rule dictate which income figure on the tax returns the creditor must use. The Internal Revenue Code may require or permit deductions from gross income, such as a deduction for capital depreciation, that a creditor reasonably would regard as not relevant to repayment ability.

The rule is also flexible as to consumers who depend heavily on bonuses and commissions. If an employed applicant stated that he was likely to receive an annual bonus of a certain amount from the employer, the creditor could verify the statement with third-party documents showing a consumer's past annual bonuses. *See* comment 34(a)(4)(ii)–1. Similarly, employees who work on commission could be asked to produce third-party documents showing past commissions.

The Board is not adopting the exemption some commenters requested for self-employed borrowers. The exemption would give borrowers and originators an incentive to declare a borrower employed by a third party to

[68] By requiring verification the rule also addresses the risk that consumers with higher-priced mortgage loans who could document income would unknowingly pay more for a loan that did not require documentation.

be self-employed to avoid having to verify the borrower's income. It is not clear how a declaration of self-employed status could be verified except by imposing the very burden the exemption would be meant to avoid, such as reviewing tax returns.

The affirmative defense. The Board received a number of comments about the proposed affirmative defense for a creditor that can show that the amounts of the consumer's income or assets the creditor relied on were not materially greater than what the creditor could have documented at consummation. The Board's reference to this defense as a ''safe harbor'' appears to have caused some confusion. Many commenters interpreted the phrase ''safe harbor'' to mean that the Board was proposing a specific way to comply with the rule. These commenters either criticized the safe harbor as insufficiently specific about how to comply (in the case of industry commenters) or urged that it be eliminated as a major loophole for avoiding verifying income and assets (in the case of consumer group and other commenters).

The Board intended the provision merely as a defense for a lender that did not verify income as required where the failure did not cause injury. The provision would place the burden on the lender to prove that its non-compliance was immaterial. A creditor that does not verify income has no assurance that the defense will be available should the loan be challenged in court. This creditor takes a substantial risk that it will not be able to prove through discovery that the income was as stated. Therefore, the Board expects that the defense will be used only in limited circumstances. For example, a creditor might be able to use the defense when a *bona fide* compliance error, such as an occasional failure of reasonable procedures for collecting and retaining appropriate documents, produces litigation. The defense is not likely to be helpful to a creditor in the case of compliance examinations because there will not be an opportunity in that context for the creditor to determine the borrower's actual income. With this clarification, the Board is adopting the affirmative defense as proposed.

The defense is available only where the creditor can show that the amounts of income and assets relied on were not materially greater than the amounts the creditor could have verified. The definition of ''material'' is not based on a numerical threshold as some commenters suggested. Rather, the commentary has been revised to clarify that creditors would be required to show that, if they had relied on the amount of verifiable income or assets, their decision to extend credit and the terms of the credit would not have been different. *See* comment 34(a)(4)(ii)(B)–2.

Narrower alternatives. The Board sought comment on whether the rule should be narrowed to prohibit only extending credit where the creditor or mortgage broker engaged in, influenced the borrower to engage in, or knew of income or asset inflation. The vast majority of commenters who addressed this alternative did not support it, and the Board is not adopting it. Placing the burden on the borrower or supervisory agency to prove the creditor knew the income was inflated would undermine the rule's effectiveness. In the case of borrower claims or counter-claims, this burden would lead to costly discovery into factual questions, and this discovery would often produce conflicting evidence (''he said, she said'') that would require trial before a factfinder. A creditor significantly increases the risk of income inflation when it accepts a mere statement of income, and the creditor is in the best position to substantially reduce this risk at limited cost by simply requiring documentation. The Board believes this approach is the most effective and efficient way to protect not just the individual borrower but also the neighbors and communities that can suffer from spillover effects of unaffordable lending.

Some industry commenters suggested adopting an affirmative defense for creditors who can show that the consumer intentionally misrepresented income or assets or committed fraud. The Board is not adopting this defense. As discussed above, a rule that provided creditors with a defense where no documentation was present could result in litigation that was costly for both sides. A defense for cases of consumer misrepresentation or fraud where the creditor documented the consumer's income or assets would be unnecessary. Creditors are allowed to rely on documents provided directly by the consumer so long as those documents provide reasonably reliable evidence of the consumer's income or assets. A consumer who provided false documentation to the creditor, and who wished to bring a claim against the creditor, would have to demonstrate that the creditor reasonably should not have relied on the document. If the only fact that made the document unreliable was the consumer's having provided false information without the creditor's knowledge, it would not have been unreasonable for the creditor to rely on that document.

Obligations. The proposal essentially required a creditor to verify repayment ability; it provided that a pattern or practice of failing to verify repayment ability created a presumption of a violation. A proposed comment indicated that verifying repayment ability included verifying obligations. *See* proposed comment 34(a)(4)(i)(A)–2. The final rule explicitly includes the requirement to verify obligations in the regulation. *See* § 226.34(a)(4)(ii)(C). A comment to this provision indicates that a credit report may be used to verify current obligations. A credit report, however, might not reflect certain obligations undertaken just before or at consummation of the transaction and secured by the same dwelling that secures the transaction (for example, a ''piggyback'' second-lien transaction used to finance part of the down payment on the house where the first-lien transaction is for home purchase). A creditor is responsible for considering such obligations of which the creditor has knowledge. *See* comment 34(a)(4)–3.

Presumption of Compliance

The Board proposed to add new, rebuttable presumptions of violations to § 226.34(a)(4) and, by incorporation, § 226.35(b)(1). These presumptions would have been for engaging in a pattern or practice of failing to consider: consumers' ability to pay the loan based on the interest rate specified in the regulation; consumers' ability to make fully-amortizing loan payments that include expected property taxes and homeowners insurance; the ratio of borrowers' total debt obligations to income as of consummation; and borrowers' residual income. *See* proposed § 226.34(a)(4)(i)(B)–(E). The Board also proposed a presumption of compliance for a creditor that has a reasonable basis to believe that consumers will be able to make loan payments for at least seven years, considering each of the factors identified in § 226.34(a)(4)(i) and any other factors relevant to determining repayment ability.

The final rule removes the proposed presumptions of violation for failing to follow certain underwriting practices and incorporates these practices, with modifications, into a presumption of compliance that is substantially revised from that proposed. Under § 226.34(a)(4)(iii), a creditor is presumed to have complied with § 226.34(a)(4) if the creditor satisfies each of three requirements: (1) Verifying repayment ability; (2) determining the consumer's repayment ability using largest scheduled payment of principal and interest in the first seven years following consummation and taking into account property tax and insurance obligations and similar mortgage-related expenses; and (3) assessing the consumer's repayment ability using at least one of the following measures: a ratio of total debt obligations to income, or the income the consumer will have after paying debt obligations. (The procedures for verifying repayment ability are required under paragraph 34(a)(4)(ii); the other procedures are not required.)

Unlike the proposed presumption of compliance, the presumption of compliance in the final rule is not conditioned on a requirement that a creditor have a reasonable basis to believe that a consumer will be able to make loan payments for a specified period of years. Comments from creditors indicated this proposed requirement was not necessary and introduced an undue degree of compliance uncertainty. The final presumption of compliance, therefore, replaces this general requirement with the three specific procedural requirements mentioned in the previous paragraph.

The creditor's presumption of compliance for following these procedures is not conclusive. The Board believes a conclusive presumption could seriously undermine consumer protection. A creditor could follow the procedures and still disregard repayment ability in a particular case or potentially in many cases. Therefore, the borrower may rebut the presumption with evidence that the creditor disregarded repayment ability despite following these procedures. For example, evidence of a very high debt-to-income ratio and a very limited residual income could be sufficient to rebut the presumption, depending on all of the facts and circumstances. If a creditor fails to follow one of the non-mandatory procedures set forth in paragraph 34(a)(4)(iii), then the creditor's compliance is determined based on all of the facts and circumstances without there being a presumption of either compliance or violation. *See* comment 34(a)(4)(iii)–1.

Largest scheduled payment in seven years. When a loan has a fixed rate and a fixed payment that fully amortizes the loan over its contractual term to maturity, there is no ambiguity about the rate and payment at which the lender should assess repayment ability: The lender will use the fixed rate and the fixed payment. But when the rate and payment can change, as has often been true of subprime loans, a lender has to choose a rate and payment at which to assess repayment ability. The Board proposed that a creditor would be presumed to have disregarded repayment ability if it had engaged in a pattern or practice of failing to use the fully-indexed rate (or the maximum rate in seven years on a step-rate loan) and the fully-amortizing payment.

As discussed, the final rule does not contain this proposed presumption of violation. Instead, it provides that a creditor will have a presumption of compliance if, among other things, the creditor uses the largest scheduled payment of principal and interest in the first seven years. This payment could be higher, or lower, than the payment determined according to the fully-indexed rate and fully-amortizing payment. The Board believes that the final rule is clearer and simpler than the proposal. It incorporates long-established principles in Regulation Z for determining a payment schedule when rates or payments can change, which should facilitate compliance. *See* comment 34(a)(4)(iii)(B)–1. The final rule is also more flexible than the proposal. Instead of requiring the creditor to use a particular payment, it provides the creditor who uses the largest scheduled payment in seven years a presumption of compliance. The creditor has the flexibility to use a lower payment, and no presumption of violation would attach; though neither would a presumption of compliance. Instead, compliance would be determined based on all of the facts and circumstances.

Two aspects of § 226.34(a)(4) help ensure that this approach provides consumers effective protection. First, the Board is adopting the proposed seven-year horizon. That is, under § 226.34(a)(4)(iii)(B) the relevant payment for underwriting is the largest payment in seven years. Industry commenters requested that the rule incorporate a time horizon of no more than five years. As these commenters indicated, most subprime loans, including those with fixed rates, have paid off (or defaulted) within five years. It is possible that prepayment speeds will slow, however, as subprime lending practices and loan terms undergo substantial changes. Moreover, the final rule addresses commenters' concern that the proposal seemed to require them to project the consumer's income, employment, and other circumstances for as long as seven years as a condition to obtaining a presumption of compliance. Under the final rule, the creditor is expected to underwrite based on the facts and circumstances that exist as of consummation. Section 226.34(a)(4)(iii)(B) sets out the payment to which the creditor should underwrite if it seeks to have a presumption of compliance. Furthermore, nothing in the regulation prohibits, or creates a presumption against, loan products that are designed to serve consumers who legitimately expect to sell or refinance sooner than seven years.

A second aspect of § 226.34(a)(4) that is integral to its balance of consumer protection and credit availability is its exclusion of two nontraditional types of loans from the presumption of compliance that can pose more risk to consumers in the subprime market. Under § 226.34(a)(4)(iv), no presumption of compliance is available for a balloon-payment loan with a term shorter than seven years. If the term is at least seven years, the creditor that underwrites the loan based on the regular payments (not the balloon payment) may retain the presumption of compliance. If the term is less than seven years, compliance is determined on the basis of all of the facts and circumstances. This approach is simpler than some of the alternatives commenters recommended to address balloon-payment loans, and it better balances consumer protection and credit availability than other alternatives they suggested.[69] Consumers are statistically very likely to prepay (or default) within seven years and avoid the balloon payment.

Loans with scheduled payments that would increase the principal balance (negative amortization) within the first seven years are also excluded from the presumption of compliance. This exclusion will help ensure that the presumption is available only for loans that leave the consumer sufficient equity after seven years to refinance. If the payments scheduled for the first seven years would cause the balance to increase, then compliance is determined

[69] One large lender contended that balloon loans should be exempted from a repayment-ability rule because consumers understand their risks. Another recommended that balloon loans be exempted from the repayment ability rule if the term of the loan exceeds seven years for first-lien mortgages or five years for subordinate-lien loans. A trade association representing community banks urged that balloon payments be permitted so long as the creditor has a reasonable basis to believe the borrower will make the payments for the term of the loan except the final, balloon payment. This trade association indicated that community banks often structure the loans they hold in portfolio as 3- or 5-year balloon loans, typically with 15–30 year amortization periods, to match the maturity of the loan to the maturity of their deposit base. A lender and a lender trade association recommended using on short-term balloon loans a payment larger than the scheduled payment but smaller than the fully-amortizing payment, such as the payment that would correspond to an interest rate two percentage points higher than the rate specified in the presumption of compliance.

on all of the facts and circumstances without a presumption of compliance or violation.

''Interest-only'' loans can have a presumption of compliance. With these loans, after an initial period of interest-only payments the payment is recast to fully amortize the loan over the remaining term to maturity. If the period of interest-only payments is shorter than seven years, the creditor may retain the presumption of compliance if it uses the fully-amortizing payment that commences after the interest-only period. If the interest-only period is seven years or longer, the creditor may retain the presumption of compliance if it assesses repayment ability using the interest-only payment. Examples have been added to the commentary to facilitate compliance. *See* comment 34(a)(4)(iii)(B)–1. Examples of variable-rate loans and a step-rate loan have also been added.

Debt-to-income ratio and residual income. The proposal provided that a creditor would be presumed to have violated the regulation if it engaged in a pattern or practice of failing to consider the ratio of consumers' total debt obligations to consumers' income or the income consumers will have after paying debt obligations. A major secondary market participant proposed that considering total DTI and residual income not be an absolute prerequisite because other measures of income, assets, or debts may be valid methods to assess repayment ability. A credit union trade association contended that residual income is not a necessary underwriting factor if a lender uses DTI. Consumer and civil rights groups, however, specifically support including both DTI and residual income as factors, contending that residual income is an essential component of an affordability analysis for lower-income families.

Based on the comments and its own analysis, the Board is revising the proposal to provide that a creditor does not have a presumption of compliance with respect to a particular transaction unless it uses at least one of the following: the consumer's ratio of total debt obligations to income, or the income the consumer will have after paying debt obligations. Thus, the final rule permits a creditor to retain a presumption of compliance so long as it uses at least one of these two measures.

The Board believes the flexibility permitted by the final rule will help promote access to responsible credit without weakening consumer protection. The rule provides creditors flexibility to determine whether using both a DTI ratio and residual income increases a creditor's ability to predict repayment ability. If one of these metrics alone holds as much predictive power as the two together, as may be true of certain underwriting models at certain times, then conditioning access to a safe harbor on using both metrics could reduce access to credit without an offsetting increase in consumer protection. The Board also took into account that, at this time, residual income appears not to be as widely used or tested as the DTI ratio.[70] It is appropriate to permit the market to develop more experience with residual income before considering whether to incorporate it as an independent requirement of a regulatory presumption of compliance.

The final rule does not contain quantitative thresholds for either of the two metrics. The Board specifically solicited comment on whether it should adopt such thresholds. Industry commenters did not favor providing a presumption of compliance (or a presumption of a violation) based on a specified debt-to-income ratio. The reasons given include: Different investors have different guidelines for lenders to follow in calculating DTI; underwriters following the same procedures can calculate different DTIs on the same loan; borrowers may want or, in some high-cost areas, may need to spend more than any specified percentage of their income on housing and may have sufficient non-collateral assets or residual incomes to support the loan; and loans with high DTIs have not necessarily had high delinquency rates. Two trade associations indicated they would accept a quantitative safe harbor if it were sufficiently flexible. Some commenters suggested a standard of reasonableness.

Consumer and civil rights groups, a federal banking agency, and others requested that the Board set threshold levels for both DTI and residual income beyond which a loan would be considered unaffordable, subject to rebuttal by the creditor. They argued that quantitative thresholds for these factors would improve compliance and loan performance. These commenters suggested that the regulation should expressly recognize that, as residual income increases, borrowers can support higher DTI levels. They provided alternative recommendations: mandate the DTI and residual income levels found in the guidelines for loans guaranteed by the Department of Veterans Affairs, 38 CFR 36.4840; develop the Board's own guidelines; or impose a threshold of 50 percent DTI with sufficient residual income. A consumer research and advocacy group, however, supported the Board's proposal not to set a quantitative threshold. It specifically opposed a 50 percent threshold as too high for sustainable lending. It further maintained that any specific DTI threshold would not be workable because proper underwriting depends on too many factors, and the definition of ''debt'' is too easily manipulated.

The Board is concerned that making a specific DTI ratio or residual income level either a presumptive violation or a safe harbor could limit credit availability without providing adequate offsetting benefits. The same debt-to-income ratio can have very different implications for two consumers' repayment ability if the income levels of the consumers differ significantly. Moreover, it is not clear what thresholds would be appropriate. Limited data are available to the Board to support such a determination. Underwriting guidelines of the Department of Veterans Affairs may be appropriate for the limited segment of the mortgage market this agency is authorized to serve, but they are not necessarily appropriate for the large segment of the mortgage market this regulation will cover.

Safe Harbors and Exemptions Not Adopted

Commenters requested several safe harbors or exemptions that the Board is not adopting. Many industry commenters sought a safe harbor for any loan approved by the automated underwriting system (AUS) of Fannie Mae or Freddie Mac; some sought a safe harbor for an AUS of any federally-regulated institution. The Board is not adopting such a safe harbor. Commenters did not suggest a clear and objective definition of an AUS that would distinguish it from other types of systems used in underwriting. It would not be appropriate to try to resolve this concern by limiting a safe harbor to the AUS's of Fannie Mae and Freddie Mac, as that would give them an unfair advantage in the marketplace. Moreover, a safe harbor for an AUS that is a ''black box'' and is not specifically required to comply with the regulation could undermine the regulation. Some industry commenters sought safe harbors for transactions that provide the consumer a lower rate or payment on the grounds that these transactions would generally benefit the borrower.

[70] Michael E. Stone, *What is Housing Affordability? The Case for the Residual Income Approach,* 17 Housing Policy Debate 179 (Fannie Mae 2006) (advocating use of a residual income approach but acknowledging that it ''is neither well known, particularly in this country, nor widely understood, let alone accepted'').

The chief example given is a refinance (without cash out) that reduces the consumer's current monthly payment or, in the case of an ARM, the payment expected upon reset. The Board does not believe that a safe harbor for such a transaction would benefit consumers. For example, it could provide an incentive to an originator to make an unaffordable loan to a consumer and then repeatedly refinance the loan with new loans offering a slightly lower payment each time.

One state Attorney General submitted a comment supporting permitting an asset-based loan where the borrower has suffered a loss of income but reasonably anticipates improving her circumstances (*e.g.*, temporary disability or illness, unemployment, or salary cut), or the borrower seeks a short-term loan because she must sell the home due to a permanent reduction in income (*e.g.*, loss of job, or divorce from co-borrower) or some other event (*e.g.*, pending foreclosure or occurrence of natural disaster). An association of mortgage brokers also recommended that exceptions be made for such cases.

The Board is not adopting safe harbors or exemptions for such ''hardship'' cases. As discussed above, the Board recognizes that consumers in such situations who fully understood the risks involved would benefit from having the ability to address their situation by taking a large risk with their home equity. At the same time, the Board is concerned that exceptions for such cases could severely undermine the rule because it would be difficult, if not impossible, to distinguish *bona fide* cases from mere circumvention. For some of these cases, such as selling a home due to divorce or job loss (or any reason) and purchasing a new, presumably less expensive home, the carve-out for bridge loans may apply.

C. Prepayment Penalties—§ 226.32(d)(6) and (7); § 226.35(b)(2)

The Board proposed to apply to higher-priced mortgage loans the prepayment penalty restrictions that TILA Section 129(c) applies to HOEPA loans. Specifically, HOEPA-covered loans may only have a prepayment penalty if: The penalty period does not exceed five years from loan consummation; the penalty does not apply if there is a refinancing by the same creditor or its affiliate; the borrower's debt-to-income (DTI) ratio at consummation does not exceed 50 percent; and the penalty is not prohibited under other applicable law. 15 U.S.C. 1639(c); see also 12 CFR 226.32(d)(6) and (7). In addition, the Board proposed, for both HOEPA loans and higher-priced mortgage loans, to require that the penalty period expire at least sixty days before the first date, if any, on which the periodic payment amount may increase under the terms of the loan.

Based on the comments and its own analysis, the Board is adopting substantially revised rules for prepayment penalties. There are two components to the final rule. First, the final rule prohibits a prepayment penalty with a higher-priced mortgage loan or HOEPA loan if payments can change during the four-year period following consummation. Second, for all other higher-priced mortgage loans and HOEPA loans—loans whose payments may not change for four years after consummation—the final rule limits prepayment penalty periods to a maximum of two years following consummation, rather than five years as proposed. In addition, the final rule applies to this second category of loans two requirements for HOEPA loans that the Board proposed to apply to higher-priced mortgage loans: the penalty must be permitted by other applicable law, and it must not apply in the case of a refinancing by the same creditor or its affiliate.

The Board is not adopting the proposed rule requiring a prepayment penalty provision to expire at least sixty days before the first date on which a periodic payment amount may increase under the loan's terms. The final rule makes such a rule unnecessary. Under the final rule, if the consumer's payment may change during the first four years following consummation, a prepayment penalty is prohibited outright. If the payment is fixed for four years, the final rule limits a prepayment penalty period to two years, leaving the consumer a penalty-free window of at least two years before the payment may increase.

In addition, for the reasons discussed below, the Board is not adopting the proposed rule prohibiting a prepayment penalty where a consumer's verified DTI ratio, as of consummation, exceeds 50 percent. This restriction, however, will continue to apply to HOEPA loans, as provided by the statute.

Under Regulation Z, 12 CFR 226.23(a)(3), footnote 48, a HOEPA loan having a prepayment penalty that does not conform to the requirements of § 226.32(d)(7) is a mortgage containing a provision prohibited by TILA Section 129, 15 U.S.C. 1639, and therefore is subject to the three-year right of the consumer to rescind. Final § 226.35(b)(2), which the Board is adopting under the authority of Section 129(l)(2), 15 U.S.C. 1639(l)(2), applies restrictions on prepayment penalties for higher-priced mortgage loans that are substantially the same as the restrictions that § 226.32(d)(6) and (7) apply on prepayment penalties for HOEPA loans. Accordingly, the Board is revising footnote 48 to clarify that a higher-priced mortgage loan (whether or not it is a HOEPA loan) having a prepayment penalty that does not conform to the requirements of § 226.35(b)(2) also is subject to a three-year right of rescission. (The right of rescission, however, does not extend to home purchase loans, construction loans, or certain refinancings with the same creditor.)

Public Comment

The Board received public input about the advantages and disadvantages of prohibiting or restricting prepayment penalties in testimony provided at the 2006 and 2007 hearings the Board conducted on mortgage lending, and in comment letters associated with these hearings. In the official notice of the 2007 hearing, the Board expressly asked for oral and written comment about the effects of a prohibition or restriction under HOEPA on prepayment penalties on consumers and on the type and terms of credit offered. 72 FR 30380, 30382 (May 31, 2007). Most consumer and community groups, as well as some state and local government officials and a trade association for community development financial institutions, urged the Board to prohibit prepayment penalties with subprime loans. By contrast, most industry commenters opposed prohibiting prepayment penalties or restricting them beyond requiring that they expire sixty days before reset, on the grounds that a prohibition or additional restrictions would reduce credit availability in the subprime market. Some industry commenters, however, stated that a three-year maximum prepayment penalty period would be appropriate.

In connection with the proposed rule, the Board asked for comment about the benefits and costs of prepayment penalties to consumers who have higher-priced mortgage loans, as well as about the costs and benefits of the specific restrictions proposed. Most financial institutions and their trade associations stated that consumers should be able to choose a loan with a prepayment penalty in order to lower their interest rate. Many of these commenters stated that prepayment penalties help creditors to manage prepayment risk, which in turn increases credit availability and lowers credit costs. Industry commenters generally opposed the proposed rule that would prohibit prepayment penalties in cases where a consumer's DTI ratio exceeds 50 percent. The few industry commenters that addressed the proposal to require that a prepayment penalty not apply in the case of a refinancing by the creditor or its affiliate opposed the provision. These commenters supported, or did not oppose, the proposal to require prepayment penalties to expire at least sixty days before any possible payment increase. Several financial institutions, an industry trade association, and a secondary-market investor recommended that the Board set a three-year maximum penalty period instead of a five-year maximum.

By contrast, many other commenters, including most consumer organizations, several trade associations for state banking authorities, a few local, state, and federal government officials, a credit union trade association, and a real estate agent trade association, supported prohibiting prepayment penalties for higher-priced mortgage loans and HOEPA loans. Many of these commenters stated that the cost of prepayment penalties to subprime borrowers outweigh the benefits of any reductions in interest rates or up-front fees they may receive. These commenters stated that the Board's proposed rule would not address adequately the harms that prepayment penalties cause consumers. Several commenters recommended alternative restrictions of prepayment penalties with higher-priced mortgage loans and HOEPA loans if the Board did not prohibit such penalties, including limiting a prepayment penalty period to two or three years following consummation or prohibiting prepayment penalties with ARMs.

Public comments are discussed in greater detail throughout this section.

Discussion

For the reasons discussed below, the Board concludes that the fairness of prepayment penalty provisions on higher-priced mortgage loans and HOEPA loans depends to an important extent on the structure of the mortgage loan. It has been common in the subprime market to structure loans to have a short expected life span. This has been achieved by building in a significant payment increase just a few years after consummation. With respect to subprime loans designed to have shorter life spans, the injuries from prepayment provisions are potentially the most serious, as well as the most difficult for a reasonable consumer to avoid. For these loans, therefore, the Board concludes that the injuries caused by prepayment penalty provisions with subprime loans outweigh their benefits. With respect to subprime loans structured to have longer expected life spans, however, the Board concludes that the injuries from prepayment penalties are closer to being in balance with their benefits, warranting restrictions but not, at this time, a prohibition.

Background. Prepayment risk is the risk that a loan will be repaid before the end of the loan term, a major risk of mortgage lending. Along with default risk, it is the major risk of extending mortgage loans. When mortgages prepay, cash flow from loan payments may not offset origination expenses or discounts consumers were provided on fees or interest rates. Moreover, prepayment when market interest rates are declining, which is when borrowers are more likely to prepay, forces investors to reinvest prepaid funds at a lower rate. Furthermore, prepayment by subprime borrowers whose credit risk declines (for example, their equity or their credit score increases) leaves an investor holding relatively riskier loans.

Creditors seek to account for prepayment risk when they set loan interest rates and fees, and they may also seek to address prepayment risk with a prepayment penalty. A prepayment penalty is a fee that a borrower pays if he repays a mortgage within a specified period after origination. A prepayment penalty can amount to several thousand dollars. For example, a consumer who obtains a 3–27 ARM with a thirty-year term for a loan in the amount of $200,000 with an initial rate of 6 percent would have a principal balance of $194,936 at the end of the second year following consummation. If the consumer pays off the loan, a penalty of six months' interest on the remaining balance—close to six monthly payments—will cost the consumer about $5,850.[71] A penalty of this magnitude reduces a borrower's likelihood of prepaying and assures a return for the investor if the borrower does prepay.

Substantial injury. Prepayment penalty provisions have been very common on subprime loans. Almost three-quarters of loans in a large dataset of securitized subprime loan pools originated from 2003 through the first half of 2007 had a prepayment penalty provision.[72] These provisions cause many consumers who pay the penalty, as well as many consumers who cannot, substantial injuries. The risk of injury is particularly high for borrowers who receive loans structured to have short expected life spans because of a significant expected payment increase.

A borrower with a prepayment penalty provision who has reason to refinance while the provision is in effect must choose between paying the penalty or foregoing the refinance, either of which could be very costly. Paying the penalty could exact several thousand dollars from the consumer; financing the penalty through the refinance loan adds interest to that cost. When the consumer's credit score has improved, delaying the refinance until the penalty expires could mean losing or at least postponing an opportunity to lower the consumer's interest rate. Declining to pay the penalty also could mean foregoing or delaying a ''cash out'' loan that would consolidate several large unsecured debts at a lower rate or help the consumer meet a major life expense, such as for medical care. Borrowers who have no ability to pay or finance the penalty, however, have no choice but to forego or delay any benefits from refinancing.

Prepayment penalty provisions also exacerbate injuries from unaffordable or abusive loans. In the worst case, where a consumer has been placed in a loan he cannot afford to pay, delaying a refinancing could increase the consumer's odds of defaulting and, ultimately, losing the house.[73] Borrowers who were steered to loans with less favorable terms than they qualify for based on their credit risk face an ''exit tax'' for refinancing to improve their terms.

Prepayment penalty provisions can cause more injury with loans designed to have short expected life spans. With these loans, borrowers are particularly likely to want to prepay in a short time to avoid the expected payment increase. Moreover, in recent years, loans designed to have short expected life spans have been among the most difficult for borrowers to afford—even before their payment increases. Borrowers with 2–28 and 3–27 ARMs have been much more likely to become

[71] This is a typical contractual formula for calculating the penalty. There are other formulas for calculating the penalty, such as a percentage of the amount prepaid or of the outstanding loan balance (potentially reduced by the percentage (for example, 20 percent) that a borrower, by law or contract, may prepay without penalty). As explained further below, a consumer may pay a lower rate in exchange for having a provision providing for a penalty of this magnitude.

[72] Figure calculated from First American LoanPerformance data.

[73] For the reasons set forth in part II.B., consumers in the subprime market have had a high risk of receiving loans they cannot afford to pay. The Board expects that the rule prohibiting disregard for repayment ability will reduce this risk substantially, but no rule can eliminate it. Moreover, its success depends on vigorous enforcement by a wide range of agencies and jurisdictions.

seriously delinquent than borrowers with fixed-rate subprime mortgages. In part, the difference reflects that borrowers receiving 2–28 and 3–27 ARMs have had lower average credit scores and less equity in their homes at origination. But the large difference also suggests that these shorter-term loans were more likely to be marketed and underwritten in ways that increase the risk of unaffordability. A prepayment penalty provision exacerbates this injury, especially because borrowers with lower credit scores are the most likely to have a need to refinance to extract cash.

Injury not reasonably avoidable. In the prime market, the injuries prepayment penalties cause are readily avoidable because lenders do not typically offer borrowers mortgages with prepayment penalty provisions. Indeed, in one large dataset of first-lien prime loans originated from 2003 to mid-2007 just six percent of loans had these provisions.[74] In a dataset of subprime securitized loans originated during the same period, however, close to three-quarters had a prepayment penalty provision.[75] Moreover, evidence suggests that a large proportion of subprime borrowers with prepayment penalty provisions have paid the penalty. Approximately 55 percent of subprime 2–28 ARMs in this same dataset originated from 2000 to 2005 prepaid while the prepayment penalty provision was in effect.[76] The data do not indicate how many consumers actually paid a penalty, or how much they paid. But the data suggest that a significant percentage of borrowers with subprime loans have paid prepayment penalties, which, as indicated above, can amount to several thousand dollars.

These figures raise a serious question as to whether a substantial majority of subprime borrowers have knowingly and voluntarily taken the very high risk of paying a significant penalty. While subprime borrowers receive some rate reduction for a prepayment penalty provision (as discussed at more length in the next subsection), they also have major incentives to refinance. They often have had difficulty meeting their regular obligations and experienced major life disruptions. Many would therefore anticipate refinancing to extract equity to consolidate their debts or pay a major expense; nearly 90 percent of subprime ARMs used for refinancings in recent years were ''cash out.''[77] In addition, many subprime borrowers would aspire to refinance for a lower rate when their credit risk declines (for example, their credit score improves, or their equity increases).

Prepayment penalties' lack of transparency also suggests that prepayment penalty provisions are often not knowingly and voluntarily chosen by subprime borrowers whose loans have them. In the subprime market, information on rates and fees is not easy to obtain. *See* part II.B. Information on prepayment penalties, such as how large they can be or how many consumers actually pay them, is even harder to obtain. The lack of transparency is exacerbated by originators' incentives—largely hidden from consumers—to ''push'' loans with prepayment penalty provisions and at the same time obscure or downplay these provisions. If the consumer seeks the lowest monthly payment—as the consumer in the subprime market often does—then the originator has a limited incentive to quote the payment for a loan without a prepayment penalty provision, which will tend to be at least slightly higher. Perhaps more importantly, lenders pay originators considerably larger commissions for loans with prepayment penalties, because the penalty assures the lender a larger revenue stream to cover the commission. The originator also has an incentive not to draw the consumer's attention to the prepayment penalty provision, in case the consumer should prefer a loan without it. Although the prepayment penalty provision must be disclosed on the post-application TILA disclosure, the consumer may not notice it amidst numerous other disclosures or may not appreciate its significance. Moreover, an unscrupulous originator may not disclose the penalty until closing, when the consumer's ability to negotiate terms is much reduced.

Even a consumer offered a genuine choice would have difficulty comparing the costs of subprime loans with and without a penalty, and would likely choose to place more weight on the more certain and tangible cost of the initial monthly payment. There is a limit to the number of factors a consumer can reasonably be expected to consider, so the more complex a loan the less likely the consumer is to consider the prepayment penalty. For example, an FTC staff study found that consumers presented with mortgage loans with more complex terms were more likely to miss or misunderstand key terms.[78]

These concerns are magnified with subprime loans structured to have short expected life spans, which will have variable rates (such as 2–28 and 3–27 ARMs) or other terms that can increase the payment. Adjustable-rate mortgages are complicated for consumers even without prepayment penalties. A Federal Reserve staff study suggests that borrowers with ARMs underestimate the amount by which their interest rates can change.[79] The study also suggests that the borrowers most likely to make this mistake have a statistically higher likelihood of receiving subprime mortgages (for example, they have lower incomes and less education).[80] Adding a prepayment penalty provision to an already-complex ARM product makes it less likely the consumer will notice, understand, and consider this provision when making decisions. Moreover, the shorter the period until the likely payment increase, the more the consumer will have to focus attention on the adjustable-rate feature of the loan and the less the consumer may be able to focus on other features.

Moreover, subprime mortgage loans designed to have short expected life spans appear more likely than other types of subprime mortgages to create incentives for abusive practices. Because these loans create a strong incentive to refinance in a short time, they are likely to be favored by originators who seek to ''flip'' their clients through repeated refinancings to increase fee revenue; prepayment penalties are frequently associated with such a strategy.[81] Moreover, 2–28 and

[74] Figure calculated from McDash Analytics data.

[75] Figure calculated from First American LoanPerformance data.

[76] *Id.*

[77] *Id.* It is not possible to discern from the data whether the cash was used only to cover the costs of refinancing or also for other purposes. *See also Subprime Refinancing* at 233 (reporting that 49 percent of subprime refinance loans involve equity extraction, compared with 26 percent of prime refinance loans); *Subprime Outcomes* at 368–371 (discussing survey evidence that borrowers with subprime loans are more likely to have experienced major adverse life events (marital disruption; major medical problem; major spell of unemployment; major decrease of income) and often use refinancing for debt consolidation or home equity extraction); *Subprime Lending Investigation* at 551–52 (citing survey evidence that borrowers with subprime loans have increased incidence of major medical expenses, major unemployment spells, and major drops in income).

[78] *Improving Consumer Mortgage Disclosures* at 74 (''[R]espondents had more difficulty recognizing and identifying mortgage cost in the complex-loan scenario. This implies that borrowers in the subprime market may have more difficulty understanding their loan terms than borrowers in the prime market. The difference in understanding, however, would be due largely to differences in the complexities of the loans, rather than the capabilities of the borrowers.'').

[79] Brian Bucks and Karen Pence, *Do Borrowers Understand their Mortgage Terms?*, Journal of Urban Economics (forthcoming 2008).

[80] *Id.*

[81] *See generally* U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of Treasury, *Recommendations to Curb*

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3–27 ARMs were marketed to borrowers with low credit scores as ''credit repair'' products, obscuring the fact that a prepayment penalty provision would inhibit or prevent the consumer who improved his credit score from refinancing at a lower rate. These loans were also associated more than other loan types with irresponsible underwriting and marketing practices that contributed to high rates of delinquency even before the consumer's payment increased.

Subprime loans designed to have short expected life spans also attracted consumers who are more vulnerable to abusive prepayment penalties. Borrowers with 2–28 and 3–27 ARMs had lower credit scores than borrowers with any other type of subprime loan.[82] These borrowers include consumers with the least financial sophistication and the fewest financial options. Such consumers are less likely to scrutinize a loan for a restriction on prepayment or negotiate the restriction with an originator, who in any event has an incentive to downplay its significance.

Injury not outweighed by countervailing benefits to consumers or to competition. The Board concludes that prepayment penalties' injuries outweigh their benefits in the case of higher-priced mortgage loans and HOEPA loans designed with planned or potential payment increases after just a few years. For other types of higher-priced and HOEPA loans, however, the Board concludes that the injuries and benefits are much closer to being in equipoise. Thus, as explained further in the next section, the final rule prohibits penalties in the first case and limits them to two years in the second.

Prepayment penalties can increase market liquidity by permitting creditors and investors to price directly and efficiently for prepayment risk. This liquidity benefit is more significant in the subprime market than in the prime market. Prepayment in the subprime market is motivated by a wider variety of reasons than in the prime market, as discussed above, and therefore is subject to more uncertainty. In principle, prepayment penalty provisions allow creditors to charge most of the prepayment risk only to the consumers who actually prepay, rather than charging all of the risk in the form of higher interest rates or up-front fees for all consumers. The extent to which creditors have actually passed on lower rates and fees to consumers with prepayment penalty provisions in their loans is debated and, moreover, inherently difficult to measure. With limited exceptions, however, available studies, discussed at more length below, have shown consistently that loans with prepayment penalties carry lower rates or APRs than loans without prepayment penalties having similar credit risk characteristics.[83]

Evidence of lower rates or APRs is not sufficient to demonstrate that penalties provide a net benefit to consumers. Some consumers may not have chosen the lower rates or APRs voluntarily and may have preferred *ex ante*, had they been properly informed, to have no prepayment penalty provision and somewhat higher rates or fees. Borrowers with these provisions who hold their loans past the penalty period are likely better off because they have lower rates and do not incur a prepayment penalty; but the benefit these borrowers receive may be small compared to the injury suffered by the many borrowers who pay the penalty, or who cannot pay it and are locked into an inappropriate or unaffordable loan. It does appear, however, that prepayment penalty provisions provide some benefit to at least some consumers in the form of reduced rates and increased credit availability.

In the case of higher-priced mortgage loans and HOEPA loans designed to have short expected life spans, the Board concludes that these potential benefits do not outweigh the injuries to consumers. Available studies generally have found reductions in interest rate or APR associated with subprime 2–28 ARMs and 3–27 ARMs to be minimal, ranging from 18 to a maximum of 29 basis points, with one study finding no rate reduction on such loans originated by brokers.[84] The one available (but unpublished) study to compare the rate reduction to the cost of the penalty itself found a net cost to the consumer with 2–28 and 3–27 ARMs.[85] The minimal rate reductions strengthen doubt that the high incidence of penalty provisions was the product of informed consumer choice. Moreover, for the reasons discussed above, prepayment penalties are likely to cause the most significant, and least avoidable, injuries when coupled with loans designed to have short expected life spans, which have proved to be the riskiest loans for consumers. On balance, therefore, the Board believes these injuries outweigh potential benefits.

For higher-priced mortgage loans and HOEPA loans structured to have longer expected life spans, however, the Board concludes that the injuries and benefits are closer to being in balance. Studies that analyze both fixed-rate mortgages and 2–28 and 3–27 ARMs show a more significant reduction of rates and fees for fixed-rate mortgages for loans with prepayment penalties, ranging from 38 basis points[86] to 60 basis points.[87] Moreover, longer-term ARMs and fixed-rate mortgages have had significantly lower delinquency rates than 2–28 and 3–27 ARMs, suggesting these mortgages are more likely to be affordable to consumers. In addition, mortgages

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Predatory Home Mortgage Lending 73 (2000) (''Loan flipping generally refers to repeated refinancing of a mortgage loan within a short period of time with little or no benefit to the borrower.''), available at *http://www.huduser.org/publications/pdf/treasrpt.pdf.*

[82] Figures calculated from First American LoanPerformance data about securitized subprime pools show that the median FICO score was 627 for fixed-rate loans and 612 for short-term hybrid ARMs (2–28 and 3–27 ARMS).

[83] *See* Chris Mayer, Tomasz Piskorski, and Alexei Tchistyi, *The Inefficiency of Refinancing: Why Prepayment Penalties Are Good for Risky Borrowers* (Apr. 28, 2008) (*Why Prepayment Penalties Are Good*), *http://www1.gsb.columbia.edu/mygsb/faculty/research/pubfiles/3065/Inefficiency%20of%20Refinancing%2Epdf;* Gregory Elliehausen, Michael E. Staten, and Jevgenijs Steinbuks, *The Effect of Prepayment Penalties on the Pricing of Subprime Mortgages,* 60 Journal of Economics and Business 33 (2008) (*Effect of Prepayment Penalties*); Michael LaCour-Little, *Prepayment Penalties in Residential Mortgage Contracts: A Cost-Benefit Analysis* (Jan. 2007) (unpublished) (*Cost-Benefit Analysis*); Richard F. DeMong and James E. Burroughs, *Prepayment Fees Lead to Lower Interest Rates,* Equity (Nov./Dec. 2005), available at *http://www.commerce.virginia.edu/faculty_research/faculty_homepages/DeMong/PrepaymentsandInterestRates.pdf* (*Prepayment Fees Lower Rates*); *but see* Keith E. Ernst, Center for Responsible *Lending, Borrowers Gain No Interest Rate Benefit from Prepayment Penalties on Subprime Mortgages* (2005), *http://www.responsiblelending.org/pdfs/rr005-PPP_Interest_Rate-0105.pdf* (*No Interest Rate Benefit*).

[84] *See Effect of Prepayment Penalties* 43 (finding that the presence of a prepayment penalty reduced risk premiums by 18 basis points for hybrid loans and 13 basis points for variable-rate loans); *Prepayment Fees Lower Rates* 5 (stating that, for first-lien subprime loans with a thirty-year term, the presence of a prepayment penalty reduced the APR by 29 basis points for adjustable-rate loans and 20 basis points for interest-only loans).

[85] *Cost-Benefit Analysis* 26 (''For the [2–28] ARM product, the total interest rate savings is significantly less than the amount of the expected prepayment penalty; for the [3–28] ARM product, the two values are approximately equal.'').

[86] *Effect of Prepayment Penalties* 43. *See also Cost-Benefit Analysis* 24 (finding the total estimated interest rate savings for fixed-rate loans to be 51 basis points for retail-originated loans and 33 basis points for broker-originated loans).

[87] *Prepayment Fees Lower Rates* 5. *See also Why Prepayment Penalties Are Good* 25 & fig. 4 (finding that, depending on the borrower's FICO score, fixed-rate loans with prepayment penalties had interest rates that were about 50 basis points (where FICO score 680 or higher) to about 70 basis points (where FICO score less than 620) lower than mortgages without prepayment penalties); *but see No Interest Rate Benefit* (finding, for subprime fixed-rate loans, that interest rates for purchase loans with a prepayment penalty were between 39 and 51 basis points higher than for such loans without a penalty and that for refinance loans there was no statistically significant difference in the interest rates paid).

designed to have longer life spans create less opportunity for flipping and other abuses, and the borrowers offered these loans may be less vulnerable to abuse. These borrowers have had higher credit scores and therefore more options, and their preference for a longer-lived loan may imply that they have a longer-term perspective and a more realistic assessment of their situation. In fact, a smaller proportion of borrowers with subprime fixed-rate mortgages with penalty provisions originated between 2000 and 2005 prepaid in the first two years (about 35 percent) than did borrowers with subprime 2–28 ARMs with penalty provisions (about 55 percent).[88] Therefore, in the case of shorter prepayment penalty provisions on loans structured to have longer life spans, the Board does not conclude at this time that the injuries from these provisions outweigh the benefits.

The Final Rule

For both higher-priced mortgage loans and HOEPA loans, the final rule prohibits prepayment penalties if periodic payments can change during the first four years following loan consummation. For all other higher-priced mortgage loans and HOEPA loans, the final rule limits the prepayment penalty period to two years after loan consummation and also requires that a prepayment penalty not apply if the same creditor or its affiliate makes the refinance loan. For HOEPA loans, the final rule retains the current prohibition of prepayment penalties where the borrower's DTI ratio at consummation exceeds 50 percent; the Board is not adopting this prohibition for higher-priced mortgage loans. The final rule sets forth the foregoing prepayment penalty rules in two separate sections: For HOEPA loans, in § 226.32(d)(7), and for higher-priced mortgage loans, in § 226.35(b)(3).

TILA Section 129(c)(2)(C), 15 U.S.C. 1639(c)(2)(C), limits the maximum prepayment penalty period with HOEPA loans to five years following consummation. The Board proposed to apply this HOEPA provision to higher-priced mortgage loans. Commenters generally stated that a five-year maximum prepayment period was too long. Some consumer organizations, an association of credit unions, and a federal banking regulatory agency recommended a two-year limit on prepayment penalty periods. A few consumer organizations recommended a one-year maximum length. Although a financial services trade association supported a five-year maximum, several financial institutions and mortgage banking trade associations and a government-sponsored enterprise stated that three years would be an appropriate maximum period for prepayment penalties with higher-priced mortgage loans.

As discussed above, the Board concludes that the injuries from prepayment penalty provisions that consumers cannot reasonably avoid outweigh these provisions' benefits with respect to higher-priced mortgage loans and HOEPA loans structured to have short expected life spans. Accordingly, the final rule prohibits a prepayment penalty provision with a higher-priced mortgage loan or a HOEPA loan whose payments may change during the first four years following consummation.[89] A four-year discount period is not common, but a three-year period was common at least until recently. Using a three-year period in the regulation, however, might simply encourage the market to structure loans with discount periods of three years and one day. Therefore, the Board adopts a four-year period in the final rule as a prophylactic measure.

The prohibition applies to loans with potential payment changes within four years, including potential increases and potential declines; the prohibition is not limited to loans where the payment can increase but not decline. The Board is concerned that such a limitation might encourage the market to develop unconventional repayment schedules for HOEPA loans and higher-priced mortgage loans that are more difficult for consumers to understand, easier for originators to misrepresent, or both. The final rule also refers specifically to periodic payments of principal or interest or both, to distinguish such payments from other payments, including amounts directed to escrow accounts. Staff commentary lists examples showing whether prepayment penalties are permitted or prohibited in particular circumstances where the amount of the periodic payment can change. The commentary also provides examples of changes that are not deemed payment changes for purposes of the rule.[90]

With respect to loans structured to have longer expected life spans, the Board concludes that the injuries from prepayment penalty provisions that are short relative to the expected life span are closer to being in balance with their benefits. Accordingly, for loans for which the payment may not change, or may change only after four or more years, the Board is not banning prepayment penalties. Instead, it is seeking to ensure the benefits of penalty provisions on these loans are in line with the injuries they can cause by limiting the potential for injury to two years from consummation.

The Board recognizes that creditors may respond by increasing interest rates, up-front fees, or both, and that some subprime borrowers may pay more than they otherwise would, or not be able to obtain credit when they would prefer. The Board believes these costs are justified by the benefits of the rule. Based on available studies, the expected increase in costs on the types of loans for which penalty provisions are prohibited is not large. For the remaining loan types, reducing the allowable penalty period from the typical three years to two years should not lead to significant cost increases for subprime borrowers. Moreover, to the extent cost increases come in the form of higher rates or fees, they will be reflected in the APR, where they may be more transparent to consumers than as a prepayment penalty. Thus, it is not clear that the efficiency of market pricing would decline.

The Board is not adopting the suggestion of some commenters that it set a maximum penalty amount. A restriction of that kind does not appear necessary or warranted at this time.

[88] Figures calculated from First American LoanPerformance data. About 90 percent of the penalty provisions on the fixed-rate loans applied for at least two years.

[89] This rule is stricter than HOEPA's statutory provision on prepayment penalties for HOEPA loans. This provision permits such penalties under certain conditions regardless of a potential payment change within the first four years. Section 129(l)(2) authorizes the Board, however, to prohibit acts or practices it finds to be unfair or deceptive in connection with mortgage loans—including HOEPA loans. Since HOEPA's restrictions on prepayment penalty provisions were adopted, much has changed to make these provisions more injurious to consumers and these injuries more difficult to avoid. The following risk factors became much more common in the subprime market: ARMs with payments that reset after just two or three years; securitization of subprime loans under terms that reduce the originator's incentive to ensure the consumer can afford the loan; and mortgage brokers with hidden incentives to ''push'' penalty provisions.

[90] As discussed above, the final rule sets forth the prepayment penalty rules in two separate sections. For HOEPA loans, § 226.32(d)(7) lists conditions that must be met for the general penalty prohibition in § 226.32(d)(6) not to apply. For higher-priced mortgage loans, § 226.35(b)(2) prohibits a penalty described in § 226.32(d)(6) unless the conditions in § 226.35(b)(i) and (ii) are met. To ensure consistent interpretation of the separate sections, the staff commentary to § 226.35(b)(2) cross-references the payment-change examples and exclusions in staff commentary to § 226.32(d)(7). The examples in staff commentary to § 226.32(d)(7)(iv) refer to a condition that final § 226.35(b)(2) does not include, however—the condition that, at consummation, the consumer's total monthly debt payments may not exceed 50 percent of the consumer's monthly gross income. The staff commentary to § 226.35(b)(2) clarifies this difference.

Sixty-day window. The Board does not believe that the proposed requirement that a prepayment penalty period expire at least sixty days before a potential payment increase would adequately protect consumers with loans where the increase was expected shortly. As discussed, these loans, such as 2–28 ARMs, will tend to attract consumers who have a short planning horizon and intend to avoid the payment increase by refinancing. If provided only a brief penalty-free window to refinance before the increase (as proposed, a window in months 23 and 24 for a 2–28 ARM), the consumer deciding whether to accept a loan with a penalty provision—assuming the consumer was provided a genuine choice—must predict quite precisely when he will want to refinance. If the consumer believes he will want to refinance in month 18 and that his credit score, home equity, and other indicators of credit quality will be high enough then to enable him to refinance, then the consumer probably would be better off with a loan without a penalty provision. If, however, the consumer believes he will not be ready or able to refinance until month 23 or 24 (the penalty-free window), he probably would be better off accepting the penalty provision. It is not reasonable to expect consumers in the subprime market to make such precise predictions. Moreover, for transactions on which prepayment penalties are permitted by the final rule, a sixty-day window would be moot because the penalty provision may not exceed two years and the payment on a loan with a penalty provision may not change during the first four years following consummation.[91]

Refinance loan from same creditor. The Board is adopting with minor revisions the proposed requirement that a prepayment penalty not apply when a creditor refinances a higher-priced mortgage loan the creditor or its affiliate originated. HOEPA imposes this requirement in connection with HOEPA loans. 15 U.S.C. 1639(c)(2)(B).

Some large financial institutions and financial institution trade associations that commented opposed the proposal. A large bank stated that the requirement would not prevent loan flipping and that mortgage brokers would easily circumvent the rule by directing repeat customers to a different creditor each time. A mortgage bankers' trade association and a large bank stated that the requirement would prevent customers from returning to the same institution with which they have existing relationships. Another large bank stated that the rule would place lenders at a competitive disadvantage when trying to refinance the loan of an existing customer.

Requiring that a prepayment penalty not apply when a creditor refinances a loan it originated will discourage originators from seeking to ''flip'' a higher-priced mortgage loan. To prevent evasion by creditors who might direct borrowers to refinance with an affiliated creditor, the same-lender refinance rule covers loans by a creditor's affiliate. Although creditors may waive a prepayment penalty when they refinance a loan that they originated to a consumer, consumers who refinance with the same creditor may be charged a prepayment penalty even if a creditor or mortgage broker has told the consumer that the prepayment penalty would be waived in that circumstance.[92]

The final rule requires that a prepayment penalty not apply where a creditor or its affiliate refinances a higher-priced mortgage loan that the creditor originated to the consumer. The final rule is based on TILA Section 129(c)(2)(B), 15 U.S.C. 1639(c)(2)(B), which provides that a HOEPA loan may contain a prepayment penalty ''if the penalty applies only to a prepayment made with amounts obtained by the consumer by means other than a refinancing by the creditor under the mortgage, or an affiliate of that creditor.'' The Board notes that TILA Section 129(c)(2)(B), 15 U.S.C. 1639(c)(2)(B), applies regardless of whether the creditor still holds the loan at the time of a refinancing by the creditor or an affiliate of the creditor. In some cases, a creditor's assignees are the ''true creditor'' funding the loan; moreover, the rule prevents loan transfers designed to evade the prohibition.

TILA Section 129(c)(2)(B) does not prohibit a creditor from refinancing a loan it or its affiliate originated but rather requires that a prepayment penalty not apply in the event of a refinancing by the creditor or its affiliate. To make clear that the associated regulation, § 226.32(d)(7)(ii), does not prohibit a creditor from refinancing a loan that the creditor (or an affiliate of the creditor) originated, the Board is revising the text of that regulation somewhat. Final § 226.32(d)(7)(ii) states that a HOEPA loan may provide for a prepayment penalty if the prepayment penalty provision will not apply if the source of the prepayment funds is a refinancing by the creditor or an affiliate of the creditor. This change clarifies, without altering, the meaning of the provision and is technical, not substantive, in nature. Final § 226.35(b)(2)(ii)(B) applies to higher-priced mortgage loans rather than to HOEPA loans but mirrors final § 226.32(d)(7)(ii) in all other respects.

Debt-to-income ratio. Under the proposed rule, a higher-priced mortgage loan could not include a prepayment penalty provision if, at consummation, the consumer's DTI ratio exceeds 50 percent. Proposed comments would have given examples of funds and obligations that creditors commonly classify as ''debt'' and ''income'' and stated that creditors may, but need not, look to widely accepted governmental and non-governmental underwriting standards to determine how to classify particular funds or obligations as ''debt'' or ''income.''

Most banking and financial services trade associations and several large banks stated that the Board should not prohibit prepayment penalties on higher-cost loans where a consumer's DTI ratio at consummation exceeds 50 percent. Several of these commenters stated that the proposed rule would disadvantage a consumer living on a fixed income but with significant assets, including many senior citizens. Some of these commenters stated that the proposed rule would disadvantage consumers in areas where housing prices are relatively high. Some consumer organizations also objected to the proposed DTI-ratio requirement, stating that the requirement would not protect low-income borrowers with a DTI ratio equal to or less than 50 percent but limited residual income.

The Board is not adopting a specific DTI ratio in the rule prohibiting disregard of repayment ability. *See* part IX.B. For the same reasons, the Board is not adopting the proposed prohibition of a prepayment penalty for all higher-priced mortgage loans where a consumer's DTI ratio at consummation exceeds 50 percent. The Board is, however, leaving the prohibition in

[91] The Board sought comment on whether it should revise § 226.20(c) or draft new disclosure requirements to reconcile that section with the proposed requirement that a prepayment penalty provision expire at least sixty days prior to the date of the first possible payment increase. This issue is also moot.

[92] This concern is evident, for example, in a settlement agreement that ACC Capital Holdings Corporation and several of its subsidiaries, including Ameriquest Mortgage Company (collectively, the Ameriquest Parties) made in 2006 with 49 states and the District of Columbia. The Ameriquest Parties agreed not to make false, misleading, or deceptive representations regarding prepayment penalties and specifically agreed not to represent that they will waive a prepayment penalty at some future date, unless that promise is made in writing and included in the terms of a loan agreement with a borrower. *See, e.g., Iowa ex rel. Miller* v. *Ameriquest Mortgage Co.*, No. 05771 EQCE–053090 at 18 (Iowa D. Ct. 2006) (Pls. Pet. 5).

place as it applies to HOEPA loans, as this prohibition is statutory, TILA Section 129(c)(2)(A)(ii), and its removal does not appear warranted at this time.

This statute provides that for purposes of determining whether at consummation of a HOEPA loan a consumer's DTI ratio exceeds 50 percent, the consumer's income and expenses are to be verified by a financial statement signed by the consumer, by a credit report, and, in the case of employment income, by payment records or by verification from the employer of the consumer (which verification may be in the form of a pay stub or other payment record supplied by the consumer). The Board proposed to adopt a stronger standard that would require creditors to verify the consumer's income and expenses in accordance with verification rules that the Board proposed and is adopting in final § 226.34(a)(4)(ii), together with associated commentary. Although the Board requested comment about the proposal to revise § 226.32(d)(7)(iii) and associated commentary, commenters did not discuss this proposal.

As proposed, the Board is strengthening the standards that § 226.32(d)(7)(iii) establishes for verifying the consumer's income and expenses when determining whether a prepayment penalty is prohibited because the consumer's DTI ratio exceeds 50 percent at consummation of a HOEPA loan. There are three bases for adopting an income verification requirement that is stronger than the standard TILA Section 129(c)(2)(A)(ii) establishes. First, under TILA Section 129(l)(2), the Board has a broad authority to update HOEPA's protections as needed to prevent unfair practices. 15 U.S.C. 1639(l)(2)(A). For the reasons discussed in part IX.B, the Board believes that relying solely on the income statement on the application is unfair to the consumer, regardless of whether the consumer is employed by another person, self-employed, or unemployed. Second, the Board has a broad authority under TILA Section 129(l)(2) to update HOEPA's protections as needed to prevent their evasion. 15 U.S.C. 1639(l)(2)(A). A signed financial statement declaring all or most of a consumer's income to be self-employment income or income from sources other than employment could be used to evade the statute. Third, establishing a single standard for verifying a consumer's income and obligations for HOEPA loans and higher-priced mortgage loans will facilitate compliance.

For the foregoing reasons, for HOEPA loans, final § 226.32(d)(7)(iii) requires creditors to verify that the consumer's total monthly debt payments do not exceed 50 percent of the consumer's monthly gross income using the standards set forth in final § 226.34(a)(4)(ii). The Board also is revising the commentary associated with § 226.32(d)(7)(iii) to cross-reference certain commentary associated with § 226.34(a)(4).

Disclosure. For reasons discussed above, the Board does not believe that disclosure alone is sufficient to enable consumers to avoid injury from a prepayment penalty. There is reason to believe, however, that disclosures could more effectively increase transparency.[93] The Board will be conducting consumer testing to determine how to make disclosures more effective. As part of this process, the Board will consider the recommendation from some commenters that creditors who provide loans with prepayment penalties be required to disclose the terms of a loan without a prepayment penalty.

D. Escrows for Taxes and Insurance—§ 226.35(b)(3)

The Board proposed in § 226.35(b)(3) to require a creditor to establish an escrow account for property taxes and homeowners insurance on a higher-priced mortgage loan secured by a first lien on a principal dwelling. Under the proposal, a creditor may allow a consumer to cancel the escrow account, but no sooner than 12 months after consummation. The Board is adopting the rule as proposed and adding limited exemptions for loans on cooperative shares and, in certain cases, condominium units.

The final rule requires escrows for all covered loans secured by site-built homes for which creditors receive applications on or after April 1, 2010, and for all covered loans secured by manufactured housing for which creditors receive applications on or after October 1, 2010.

Public Comments

Many community banks and mortgage brokers as well as several industry trade associations opposed the proposed escrow requirement. Many of these commenters contended that mandating escrows is not necessary to protect consumers. They argued that consumers are adequately protected by the proposed requirement to consider a consumer's ability to pay tax and insurance obligations under § 226.35(b)(1), and by a disclosure of estimated taxes and insurance they recommended the Board adopt. Commenters also contended that setting up an escrow infrastructure would be very expensive; creditors will either pass on these costs to consumers or decline to originate higher-priced mortgage loans.

Individual consumers who commented also expressed concern about the proposal. Some consumers expressed a preference for paying their taxes and insurance themselves out of fear that servicers may fail to pay these obligations fully and on-time. Many requested that, if escrows are required, creditors be required to pay interest on the escrowed funds.

Several industry trade associations, several large creditors and some mortgage brokers, however, supported the proposed escrow requirement. They were joined by the consumer groups, community development groups, and state and federal officials that commented on the issue. Many of these commenters argued that failure to escrow leaves consumers unable to afford the full cost of homeownership and would face expensive force-placed insurance or default, and possibly foreclosure. Commenters supporting the proposal differed on whether and under what circumstances creditors should be permitted to cancel escrows.

Large creditors without escrow systems asked for 12 to 24 months to comply if the proposal is adopted.

Discussion

As commenters confirmed, it is common for creditors to offer escrows in the prime market, but not in the subprime market. The Board believes that this discrepancy is not entirely the result of consumers in the subprime market making different choices than consumers in the prime market. Rather, subprime consumers, whether they would wish to escrow or not, face a market where competitive forces have prevented significant numbers of creditors from offering escrows at all. In such a market, consumers suffer significant injury, especially, but not only, those who are not experienced handling property taxes and insurance on their own and are therefore least able to avoid these injuries. The Board finds that these injuries outweigh the costs to consumers of offering them escrows. For these reasons, the Board finds that it is unfair for a creditor to make a higher-priced mortgage loan without presenting

[93] For example, an FTC study based on quantitative consumer testing using several fixed-rate loan scenarios found that improving a disclosure of the prepayment penalty provision increased the percentage of participants who could tell that they would pay a prepayment penalty if they refinanced. *Improving Mortgage Disclosures* 109.

the consumer a genuine opportunity to escrow. In order to ensure that the opportunity to escrow is genuine, the final rule requires that creditors establish escrow accounts for first-lien higher-priced mortgage loans for at least twelve months. The Board believes that consumers, creditors, and investors will all benefit from this requirement.

Lack of escrow opportunities in the subprime market. Relative to the prime market, few creditors in the subprime market offer consumers the opportunity to escrow. The Board believes that, absent a rule requiring escrows, market forces alone are unlikely to drive significant numbers of creditors to begin to offer escrows in the subprime market. Consumers in the subprime market tend to shop based on monthly payment amounts, rather than on interest rates.[94] So creditors who are active in the subprime market, and who can quote low monthly payments to a prospective borrower, have a competitive advantage over creditors that quote higher monthly payments. A creditor who does not offer the opportunity to escrow (and thus quotes monthly payments that do not include amounts for escrows) can quote a lower monthly payment than a creditor who does offer an opportunity to escrow (and thus quotes a higher monthly payment that includes amounts for escrow). Consequently, creditors in the subprime market who offer escrows may be at a competitive disadvantage to creditors who do not.

Creditors who offer escrows could try to overcome this competitive disadvantage by advertising the availability and benefits of escrows to subprime consumers. Yet offering escrows entails some significant cost to the creditor. The creditor must either outsource servicing rights to third party servicers and lose servicing revenue, or make a large initial investment to establish an escrow infrastructure in-house. According to comments from some creditors, the cost to set up an escrow infrastructure could range between one million dollars and $16 million for a large creditor. While escrows improve loan performance[95] and offer creditors assurance that the collateral securing the loan is protected, those advantages alone have not proven sufficient incentive to make escrowing widespread in the subprime market. Rather, if a creditor is to recoup its costs for offering an opportunity to escrow, the creditor must convince a significant number of subprime consumers that they would be better served by accepting a higher monthly payment with escrows rather than a lower monthly payment without escrows. Yet consumers' focus on the lowest monthly payments in the subprime market, and the lack of familiarity with escrows, could make it difficult to convince consumers to accept the higher payment. In addition, the creditor who offered escrows would be vulnerable to competitors' attempts to lure away existing borrowers by quoting a lower monthly payment without disclosing that the payment does not include amounts for escrows. Nor could a creditor who offered escrows necessarily count on consumers who wanted to escrow finding the creditor on their own. If only a small minority of creditors offer escrows, consumers would, on average, have to contact many creditors in order to find one that offers escrows and many consumers might reasonably give up the search before they were successful.

Under these conditions, creditors are unlikely to offer escrows unless their competitors are required to offer escrows. The Board believes that creditors' failure to establish a capacity to escrow is a collective action problem; creditors would likely be better off if escrows were widely available in the subprime market, but most creditors who have not offered escrows lack the necessary incentive to invest in the requisite systems unless their competitors do. This is the context for the Board's finding that it is unfair for a creditor to make a higher-priced mortgage loan without offering an escrow.

Substantial injury. A creditor's failure to offer escrows can cause consumers substantial injury. The lack of escrows in the subprime market increases the risk that consumers will base borrowing decisions on unrealistically low assessments of their mortgage-related obligations. Brokers and loan officers operating in a market where escrows are not common generally quote monthly payments of only principal and interest. These originators have little incentive to disclose or emphasize additional obligations for taxes and insurance. Therefore, many consumers will decide whether they can afford the offered loan on the basis of misleadingly low payment quotes, making it more likely that they will obtain mortgages they cannot afford. This risk is particularly high for first time homebuyers, who lack experience with the obligations of homeownership. The risk is also elevated for homeowners who currently have prime loans and contribute to an escrow. If their circumstances change and they refinance in the subprime market, they may not be aware that payments quoted to them do not include amounts for escrow. For example, current homeowners who have substantial unsecured consumer debt, but who also have equity in their homes, can be especially vulnerable to ''loan flipping'' because they may find a cash-out refinance offer attractive. Yet if they assumed, erroneously, that the monthly payment quoted to them included amounts for escrows, they would not be able to evaluate the true cost of the loan product being offered.

The lack of escrows in the subprime market also makes it more likely that certain consumers will not be able to handle their mortgage obligations including taxes and insurance. Subprime consumers, by definition, are those who have experienced some difficulty in making timely payments on debt obligations. For this reason, some consumers may prefer to escrow if offered a choice, especially if they know from personal experience that they have difficulty saving on their own, paying their bills on-time, or both. Without an escrow, these consumers may be at greater risk that a servicer will impose costly force-placed homeowners insurance or the local government will seek to foreclose to collect unpaid taxes. Consumers with unpaid property tax or insurance bills are particularly vulnerable to predatory lending practices: originators offering them a refinancing with ''cash out'' to cover their tax and insurance obligations can take advantage of their urgent circumstances. The consumers who cannot or will not borrow more (for example, because they lack the equity) face default and a forced sale or foreclosure.

Injury not reasonably avoidable. Consumers cannot reasonably avoid the injuries that result from the lack of escrows. As described above, originators in the subprime market have strong incentives to quote only principal and interest payment amounts, and much

[94] *Subprime Mortgage Investigation* at 554 (''Our focus groups suggested that prime and subprime borrowers use quite different search criteria in looking for a loan. Subprime borrowers search primarily for loan approval and low monthly payments, while prime borrowers focus on getting the lowest available interest rate. These distinctions are quantitatively confirmed by our survey.'').

[95] An industry representative at the Board's 2007 hearing indicated that her company's internal analysis showed that escrows clearly improved loan performance. *Home Ownership and Equity Protection Act (HOEPA): Public Hearing*, at 66 (June 14, 2007) (statement of Faith Schwartz, Senior Vice President, Option One Mortgage Corp.), available at *http://federalreserve.gov/events/publichearings/hoepa/2007/20070614/transcript.pdf.* Also, the Credit Union National Association and California and Nevada Credit Union Leagues comment letters note that ''[o]verall, loans with escrow accounts are likely to perform better than loans without these accounts.''

weaker incentives to inform consumers about tax and insurance obligations since doing so could put them at a competitive disadvantage. Consumers may either be left unaware of the magnitude of their taxes and insurance obligations, or may not realize that amounts for taxes and insurance are not being escrowed for them if they are accustomed to the prime market's practice of escrowing. And, in a market where few creditors offer escrows and advertise their availability, consumers who would prefer to escrow may give up trying to find a creditor who offers escrows. Given the market they face, subprime consumers have little ability or incentive to shop for a loan with escrows, and thus cannot reasonably avoid a loan that does not offer escrows.

Injury not outweighed by countervailing benefit to consumers or to competition. The Board recognizes that creditors incur costs in initiating escrow capabilities and that creditors who do not escrow can pass their cost savings on to consumers. Creditors that offer escrows in-house may incur potentially substantial costs in setting up or acquiring the necessary systems, although they may also gain some additional servicing revenue. Creditors that outsource servicing of escrow accounts to third parties incur some cost and forgo servicing revenue.

In addition, there are some potential costs to consumers. Servicers may at times collect more funds than needed or fail to pay property taxes and insurance when due, causing consumers to incur penalties and late fees. Congress has expressly authorized the Department of Housing and Urban Development (HUD) to address these problems through section 10 of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2609, which limits amounts that may be collected for escrow accounts; requires servicers to provide borrowers annual statements of the escrow balance and payments for property taxes and homeowners insurance; and requires a mortgage servicer to provide information about anticipated activity in the escrow accounts for the coming year when it starts to service a loan. RESPA also provides consumers the means to resolve complaints by filing a ''qualified written request'' with the servicer. The Board expects that the number of qualified written requests may increase after the final rule takes effect.

On the other hand, there is evidence, described above, that where escrows are used they improve loan performance to the advantage of creditors, investors, and consumers alike. This appears to be an important reason that escrows are common in the prime market and often required by the creditor. Loans with escrows generally perform better than loans without because escrows make it more likely that consumers will be able to pay their obligations. By contrast, when consumers are faced with unpaid taxes and insurance, they may need to tap into their home equity to pay these expenses and may become vulnerable to predatory lending. In the worst cases, consumers may lose their homes to foreclosure for failure to pay property taxes. For these reasons, the Board finds that the benefits from escrows outweigh the costs associated with requiring them.

The Final Rule

The final rule prohibits a creditor from extending a first-lien higher-priced mortgage loan secured by a principal dwelling without escrowing property taxes, homeowners insurance, and other insurance obligations required by the creditor. Creditors have the option to allow for cancellation of escrows at the consumer's request, but no earlier than 12 months after consummation of the loan transaction. The Board is adopting an exemption for loans secured by cooperative shares and a partial exemption for loans secured by condominium units. The final rule defines ''escrow account'' by reference to the definition of ''escrow account'' in RESPA. Moreover, RESPA's rules for administering escrow accounts (including how creditors handle disclosures, initial escrow deposits, cushions, and advances to cover shortages) apply. The final rule also complements the National Flood Insurance Program requirement that flood insurance premiums be escrowed if the creditor requires escrow for other obligations such as hazard insurance.[96]

The rule is intended to address the consumer injuries described above caused by the lack of a genuine opportunity to escrow in the subprime market. The rule assures a genuine opportunity to escrow by establishing a market that provides widespread escrows through a requirement that every creditor that originates higher-priced mortgage loans secured by a first lien on a principal dwelling establish an escrow with each loan. The Board proposed to limit the rule to first-lien higher-priced mortgage loans because creditors in the prime market have traditionally required escrow accounts on first-lien mortgage loans as a means of protecting the lender's interest in the property securing the loan. The final rule adopts this approach. A mandatory escrow account on a first-lien loan ensures that funds are set aside for payment of property taxes and insurance premiums and eliminates the need to require an escrow on second lien loans. One commenter asked the Board to clarify in the final rule that creditors are not obligated to escrow payments for optional items that the consumer may choose to purchase at its discretion, such as an optional debt-protection insurance or earthquake insurance. A commentary provision has been added to clarify that creditors and servicers are not required to escrow optional insurance items chosen by the consumer and not otherwise required by creditor. *See* comment to § 226.35(b)(4)(i).

The Board recognizes that escrows can impose certain financial costs on both creditors and borrowers. Creditors are likely to pass on to consumers, either in part or entirely, the cost of setting up and maintaining escrow systems, whether done in-house or outsourced. The Board also recognizes that prohibiting consumers from canceling before 12 months have passed will impose costs on individual consumers who prefer to pay property taxes and insurance premiums on their own, and to earn interest on funds that otherwise would be escrowed.[97] By paying property taxes and insurance premiums directly, consumers are better able to monitor that their payments are credited on time, thus limiting the likelihood, and related cost, of servicing mistakes and abuses. In addition, homebuyers do not need as much cash at closing when they are not required to have an escrow account.

The Board believes, however, that the benefits of the rule outweigh these costs. Moreover, the rule preserves some degree of consumer choice by permitting a creditor to provide the consumer an option to cancel an escrow account 12 or more months after consummation. The Board considered alternatives that would avoid requiring a creditor to set up an escrow system,

[96] Congress authorized NFIP through the National Flood Insurance Act of 1968 (42 U.S.C. 4001), which provides property owners with an opportunity to purchase flood insurance protection made available by the federal government for buildings and their contents. NFIP requires all federally regulated private creditors and government-sponsored enterprises (GSEs) that purchase loans in the secondary market to ensure that a building or manufactured home and any applicable personal property securing a loan in a special flood hazard area are covered by adequate flood insurance for the term of the loan. The flood insurance requirements do not apply to creditors or servicers that are not federally regulated and that do not sell loans to Fannie Mae and Freddie Mac or other GSEs.

[97] Some states require creditors to pay interest to consumers for escrowed funds but most states do not have such a requirement.

or that would require a creditor to offer an escrow, but permit consumers to opt-out of escrows at closing. These alternatives would not provide consumers sufficient protection from the injuries discussed above, as explained in more detail below.

Alternatives to requiring creditors to escrow. Some creditors that currently do not escrow oppose requiring escrows because of the substantial cost to set up new systems and maintain them over time. They suggested that narrower, less costly alternatives would protect consumers adequately. Most of these suggestions involved disclosure, such as: requiring creditors to warn consumers that they will be responsible for property tax and insurance obligations; estimating these obligations on the TILA disclosure based on recent assessments; and prohibiting creditors from advertising monthly payments without including estimated amounts for property taxes and insurance.

The Board does not believe that these disclosures would adequately protect consumers from the injuries discussed above. Because many consumers focus on monthly payment obligations, competition would continue to give originators incentives to downplay tax and insurance obligations when they discuss payment obligations with consumers. A disclosure provided at origination of the estimated property tax and insurance premiums does not assist those consumers who need an escrow to ensure they save for and pay their obligations on time. Moreover, adding a disclosure to the many disclosures consumers already receive would not be sufficient to educate first time homebuyers and homeowners whose previous loans contained escrows who lack any real experience handling their own taxes and insurance. Disclosure does, however, have an important role to play. Under the final rule, an advertisement for closed-end credit secured by a first lien on a principal dwelling that states a monthly payment of principal and interest must prominently disclose that taxes and insurance premiums are not included. *See* § 226.24(f)(3). Moreover, the Board plans to explore revising the TILA disclosures to add an estimate of property tax and insurance premium costs to the disclosed monthly payment.

For similar reasons, merely mandating that creditors offer escrows, but not that they require them, would not sufficiently address the injuries associated with the failure to escrow. Without a widespread requirement to escrow, some creditors could still press a competitive advantage in quoting low monthly payments that do not include amounts for escrows by encouraging consumers to decline the offered escrow. A rule that required creditors merely to offer escrows would impose essentially the same costs on creditors to establish escrow systems as would the requirement to establish escrows, but would not alter the competitive landscape of the subprime market in a way that would make widespread escrowing more likely.

Creditors also suggested that consumers would be adequately protected by the final rule's requirement that creditors consider a consumer's ability to handle tax and insurance obligations in addition to principal and interest payments when originating loans. *See* § 226.34(a)(4). While this requirement will help ensure that consumers can afford their monthly payment obligations, it will not adequately address the injuries discussed above because creditors would continue to have incentives to downplay tax and insurance obligations when they discussed payment obligations with consumers. Nor will the rule requiring consideration of repayment ability sufficiently assist consumers in saving on their own.

Another alternative would be to require escrows only for first time homebuyers or other classes of borrowers (such as previously prime borrowers) less likely to have experience handling tax and insurance obligations on their own. However, limiting the escrow requirement to borrowers who are unaccustomed to paying taxes and insurance on their own would only delay injury, rather than prevent it. For example, if first time homebuyers with higher-priced mortgage loans were required to escrow, those consumers would not gain the experience of paying property taxes and insurance on their own and might reasonably believe that escrows are standard. When those consumers went to refinance their loan, however, creditors could mislead them by quoting payments without amounts for escrow and the consumers might not be able to handle the tax and insurance obligations on their own.

In addition, requiring escrows only for first time homebuyers or other classes of borrowers would not save a creditor the substantial expense of setting up an escrow system unless the creditor declined to extend higher-priced mortgage loans to such borrowers. The Board believes most creditors would not find this option practical over the long term. Moreover, defining the categories of covered borrowers would present practical challenges, require regular adjustment as the market changed, and complicate creditors' compliance.

Several commenters recommended that the requirement to escrow be limited to higher-priced mortgage loans with a combined loan-to-value ratio that exceeds 80 percent. They contended that borrowers with at least 20 percent equity have the option to tap this equity to finance tax and insurance obligations. The suggested exemption could, however, have the unintended consequence of permitting unscrupulous originators to ''strip'' the equity from less experienced borrowers. As described above, homeowners with existing escrow accounts who want to refinance their loans may assume erroneously that payment quotes include escrows when they do not, or they may prefer the security that an escrow would provide if offered.

Cancellation after consummation. The final rule permits, but does not require, creditors to offer consumers an option to cancel their escrows 12 months after consummation of the loan transaction. Based on the operation of escrows in the prime market, the Board anticipates that creditors will likely offer cancellation in exchange for a fee. The Board acknowledges concerns expressed by individual consumers that requiring them to escrow for even a relatively short time will increase their costs. These costs include the opportunity costs of the funds in escrow, particularly if the funds do not earn interest; a fee to cancel after 12 months; costs associated with mistakes or abuses by escrow agents; and the cost of saving for the deposit at consummation of two months or more of escrow payments that RESPA permits a creditor to require. Mindful of these costs, the Board considered requiring only that creditors offer consumers a choice to escrow either on an ''opt in'' or ''opt out'' basis.

As explained above, the Board concluded that a requirement merely to offer the consumer a choice to escrow would not be effective to prevent the injuries associated with the lack of opportunity to escrow. A requirement to offer, not require, escrows would raise creditors' costs but would not eliminate their incentive to quote lower payment amounts without escrows and encourage borrowers to opt-out. Requiring creditors to disclose information about the benefits of escrowing would not adequately address this problem. It is likely that most consumers would reasonably focus their attention more on disclosures about the terms of the credit being offered, such as the monthly payment amount, rather than on information about the benefits of escrowing. An originator engaged in loan flipping might reassure the consumer that if the consumer has any difficulty with the tax and insurance obligations the originator will refinance the loan.

For the foregoing reasons, the Board does not believe that requiring creditors merely to offer escrows with higher-priced mortgage loans, with an opt out or opt in before consummation, would provide consumers sufficient protection. The Board has concluded that requiring creditors to impose escrows on borrowers with higher-priced mortgage loans, with an option to cancel only some time after consummation, would more effectively address the problems created by subprime creditors' failure to offer escrows. This approach imposes costs on creditors that will be passed on, at least in part, to consumers but the Board believes these costs are outweighed by the benefits. Moreover, to the extent that escrows improve loan performance and lead to fewer defaults, the benefits of escrows may reduce the costs associated with establishing and maintaining escrow accounts.

Twelve months mandatory escrow. The final rule sets the mandatory period for escrows at 12 months after loan origination, at which point creditors may allow borrowers to opt out of escrow. Some community groups commented that escrows should be mandatory for a longer period or even the life of the loan. Several groups commented that borrowers should not be allowed to opt out unless they have demonstrated a record of timely payments. Several commenters noted that consumers should be allowed to opt out at loan consummation.

The Board believes that a 12 month period appropriately balances consumer protection with consumer choice. For the reasons already explained, a mandatory period of some length is necessary to ensure that originators will not urge consumers to reduce their monthly payment by choosing not to escrow immediately at, or shortly after, loan consummation. Twelve months appears to be a sufficiently long period to render such efforts ineffectual, and to introduce consumers to the benefits of escrowing, as most consumers will receive bills for taxes and insurance in that period. Moreover, 12 months is a relatively short period compared to the expected life of the average loan, providing consumers an opportunity to handle their own taxes and insurance obligations after the initial escrow requirement expires.

Although fees to cancel escrow accounts are common, a consumer who expects to hold the loan for a long period may find it worthwhile to pay the fee. The final rule neither permits nor prohibits creditors from imposing escrow cancellation fees and instead defers to state law on that issue. Similarly, the rule neither requires nor prohibits payment of interest on escrow accounts since some, but not all, states have chosen to address consumer concerns about losing the opportunity to invest their funds by requiring creditors to pay interest on funds in escrow accounts.

Exemptions for Cooperatives; Partial Exemption for Condominiums

In response to comments and the Board's own analysis, the final rule does not require escrows for property taxes and insurance premiums for first-lien higher-priced mortgage loans secured by shares in a cooperative if the cooperative association pays property tax and insurance premiums. The final rule requires escrows for property taxes for first-lien higher-priced mortgage loans secured by condominium units but exempts from the escrow requirement insurance premiums if the condominium's association maintains and pays for insurance through a master policy.

Cooperatives. The final rule exempts mortgage loans for cooperatives from the escrow requirement if the cooperative pays property tax and insurance premiums, and passes the costs on to individual unit owners based on their pro rata ownership share in the cooperative. A cooperative association typically owns the building, land, and improvements, and each unit owner holds a cooperative share loan based on the appraisal value of the shareholder's unit. Creditors typically require cooperative associations to maintain insurance coverage under a single package policy, commonly called an association master policy, for common elements, including fixtures, service equipment and common personal property. Creditors periodically review an association master policy to ensure adequate coverage.

At loan origination, creditors inform consumers of their monthly cooperative association dues, which include, among other costs, the consumer's pro rata share for insurance and property taxes. When property taxes and insurance premiums are included in the monthly association dues, they are generally not escrowed with the lender. This is because the consumer's payment of the monthly association dues acts in a manner similar to an escrow itself. In this way, the collection of insurance premiums and property tax amounts on a monthly basis by a cooperative association ensures that taxes and insurance are paid when due.

Condominiums. The final rule exempts certain higher-priced mortgage loans secured by condominium units from the requirement to escrow for homeowners insurance where the only insurance policy required by the creditor is the condominium association master policy. No exemption is provided, however, for escrows for property taxes.

Typically, individual condominium units are taxed similarly to single-family homes. Generally, each unit owner pays the property tax for the unit and each unit is assessed its pro rata share of property taxes for common areas. Condominium owners who do not have escrow accounts receive property tax bills directly from the taxing jurisdiction. The final rule requires escrows for property taxes for all higher-priced mortgage loans secured by condominium units, regardless of whether creditors are required to escrow insurance premiums for such loans.

Homeowners insurance for condominiums, on the other hand, can vary based on the condominium association's bylaws and other governing regulations, as well as specific creditor requirements. Generally, the condominium association insures the building and the common area under an association master policy. In some cases, the condominium association does not insure individual units and a separate insurance policy must be written for each individual unit, just as it would be for a single-family home. In other cases, the master policy does cover individual unit owners' fixtures and improvements other than personal property. When the condominium association insures the entire structure, including individual units, the condominium association pays the insurance premium and passes the costs on to the individual unit owner. Much like the cooperative arrangement described above, the consumer's payment of insurance premiums through condominium association dues acts in a manner similar to an escrow account. For this reason, the final rule does not require creditors to escrow insurance premiums for higher-priced mortgage loans secured by condominium units if the only insurance that the creditor requires is an association master policy that insures condominium units.

Manufactured Housing

The final rule requires escrows for all covered loans secured by manufactured housing for which creditors receive applications on or after October 1, 2010 to allow creditors and servicers sufficient time to establish the capacity to escrow. Manufactured housing industry commenters requested that manufactured housing loans be exempted from the escrow requirement. They argued that manufactured housing loans are mostly personal property loans taxed in many local jurisdictions like other personal property, and that creditors and servicers do not require and do not offer escrows on manufactured housing loans.[98] For reasons discussed in more detail below, the final rule does not exempt from the escrow requirement higher-priced mortgage loans secured by a first lien on manufactured housing used as the consumer's principal dwelling. The final rule applies to manufactured housing whether or not state law treats it as personal or real property.[99]

A manufactured home owner typically pays personal property taxes directly to the taxing authority and insurance premiums directly to the insurer. Manufactured housing industry commenters argued that if a taxing jurisdiction does not have an automated personal property tax system, creditors and servicers would have to service escrows on manufactured housing loans manually at prohibitively high cost, especially taking into consideration small loan size and low amount of property taxes for an average manufactured home.

The Board believes, nonetheless, that problems associated with first-lien higher-priced mortgage loans secured by manufactured housing are similar to problems associated with site-built home loans discussed above. Large segments of manufactured housing consumers are low to moderate income families who may not enter the market with full information about the obligations associated with owning manufactured housing. Instead, consumers are likely to rely on the dealer or the manufacturer as their source for information, which can leave consumers vulnerable. Often, consumers obtain financing through the dealer, who ties the financing to the sale of the home. In addition, commissions and yield spread premiums may be paid to dealers for placing consumers in high cost loans.[100]

In addition, manufactured homes are usually concentrated in developments, such as parks, where they represent a large percentage of homes. Where property tax revenues are the main source of funding for local government services, a failure by a significant number of homeowners to pay property taxes could cause a reduction in local government services and an attendant decline in property values.

The Board believes that homeowners of manufactured housing should be afforded the same consumer protections as the owners of site-built homes. Manufactured homes provide much needed affordable housing for millions of Americans who, like owners of site-built homes, risk losing their homes for failure to pay property taxes. Escrows for property taxes and insurance premiums on first-lien, higher-priced mortgage loans secured by manufactured homes that are consumers' principal dwellings are necessary to prevent creditors from understating the cost of homeownership, to inform consumers that their manufactured home is subject to property tax, and to extend an opportunity to consumers to escrow funds each month for payment of property tax and insurance premiums.

State Laws

Several industry commenters asked the Board to clarify in the final rule that the escrow requirement preempts inconsistent state escrow laws. TILA generally preempts only inconsistent state laws. *See* TILA Section 111(a)(1), 15 U.S.C. 1610, § 226.28. Several consumers expressed concern that the regulation would preempt state laws requiring creditors to pay interest on escrow accounts under certain conditions. The final rule does not prevent states from requiring creditors to pay interest on escrowed amounts. *See* comment § 226.35(b)(4)(i).

Effective Date

Several industry representatives commented that the escrow requirement would require major system and infrastructure changes by creditors that do not currently have escrow capabilities. They asked for an extended compliance deadline of 12 to 24 months prior to the effective date of the final rule to allow for necessary escrow systems and procedures to develop. The Board recognizes that creditors and servicers will need some time to develop in-house escrowing capabilities or to outsource escrow servicing to third parties. For that reason, the Board agrees that an extended compliance period is appropriate for most covered loans secured by site-built homes. Therefore, the final rule is effective for first-lien higher-priced mortgage loans for which creditors receive applications on or after April 1, 2010, except for loans secured by manufactured housing. Recognizing that there is a limited infrastructure for escrowing on manufactured housing loans, and that yet additional time is needed for creditors and servicers to comply with the rule, the final rule is effective for all covered loans secured by manufactured housing for which creditors receive applications on or after October 1, 2010.

E. Evasion Through Spurious Open-End Credit—§ 226.35(b)(4)

The exclusion of HELOCs from § 226.35 is discussed in subpart A. above. As noted, the Board recognizes that the exclusion of HELOCs could lead some creditors to attempt to evade the restrictions of § 226.35 by structuring credit as open-end instead of closed-end. Section 226.34(b) addresses this risk as to HOEPA loans by prohibiting creditors from structuring a transaction that does not meet the definition of ''open-end credit'' as a HELOC to evade HOEPA. The Board proposed to extend this rule to higher-priced mortgage loans and is adopting § 226.35(b)(5). Section 226.35(b)(5) prohibits a creditor from structuring a closed-end transaction—that is, a transaction that does not meet the definition of ''open-end credit''—as a HELOC to evade the restrictions of § 226.35. The Board is also adding comment 35(b)(5)-1 to provide guidance on how to apply the higher-priced mortgage loan APR trigger in § 226.35(a) to a transaction structured as open-end credit in violation of § 226.35. Comment 35(b)(5)-1 is substantially similar to comment 34(b)-1 which applies to HOEPA loans.

Public Comment

The Board received relatively few comments on the proposed anti-evasion rule. As discussed in subpart A. above, some commenters suggested applying § 226.35 to HELOCs, which would

[98] Manufactured housing creditors are currently required by law to escrow for property taxes in Texas. Prior to passing state legislation requiring escrows on manufactured housing, Texas legislators observed that many manufactured housing owners were unaware of, and unable to pay, their property tax. *See* Tex. SB 521, 78th Tex. Leg., 2003, effective June 18, 2003; bill analysis available through the Texas Senate Research Center at *http://www.legis.state.tx.us/tlodocs/78R/analysis/pdf/SB00521I.pdf*.

[99] Regulation Z currently defines a dwelling to include manufactured housing. *See* § 226.2(a)(19). Official staff commentary § 226.2(a)(19) states that mobile homes, boats and trailers are dwellings if they are in fact used as residences; § 226.2(b) clarifies that the definition of ''dwelling'' includes any residential structure, whether or not it is real property under state law; §§ 226.15(a)(1)–5 and 226.23(a)(1)–3 make clear that a dwelling may include structures that are considered personal property under state laws (*e.g.*, mobile home, trailer or houseboat) and draws no distinction between personal property loans and real property loans.

[100] *Kevin Jewell, Market Failures Evident in Manufactured Housing* (Jan. 2003), *http://www.consumersunion.org/consumeronline/pastissues/housing/marketfailure.html*.

eliminate the need for an anti-evasion provision. By contrast, some creditors who supported the exclusion of HELOCs from § 226.35 noted that the presence of the anti-evasion provision would address concerns about HELOCs being used to evade the rules in § 226.35. However, a few creditors expressed concern that the anti-evasion proposal was too vague. One commenter stated that loans that do not meet the definition of open-end credit would be subject to the closed-end rules with or without the anti-evasion provision, and this commenter stated that therefore the anti-evasion provision was unnecessary and might cause confusion.

The Board also requested comment on whether it should limit an anti-evasion rule to HELOCs secured by first-liens, where the consumer draws down all or most of the entire line of credit immediately after the account is opened. Commenters did not express support for this alternative, and a few explicitly opposed it.

The Final Rule

The Board is adopting the anti-evasion provision as proposed. The rule is not meant to add new substantive requirements for open-end credit, but rather to ensure that creditors do not structure a loan which does not meet the definition of open-end credit as a HELOC to evade the requirements of § 226.35. The Board recognizes that consumers may prefer HELOCs to closed-end home equity loans because of the added flexibility HELOCs provide them. The Board does not intend to limit consumers' ability to choose between these two ways of structuring home equity credit. The anti-evasion provision is intended to reach cases where creditors have structured loans as open-end ''revolving'' credit, even if the features and terms or other circumstances demonstrate that the creditor had no reasonable expectation of repeat transactions under a reusable line of credit. Although the practice violates TILA, the new rule will subject creditors to HOEPA's stricter remedies if the credit carries an APR that exceeds § 226.35's APR trigger for higher-priced mortgage loans.

The Board is also adding comment 35(b)(5)-1 to provide guidance on how to apply the higher-priced mortgage loan APR trigger in § 226.35(a) to a transaction structured as open-end credit in violation of § 226.35. Specifically, the comment provides guidance on how to determine the ''amount financed'' and the ''principal loan amount'' needed to determine the loan's APR. The comment provides that the amount of credit that would have been extended if the loan had been documented as a closed-end loan is a factual determination to be made in each case.

X. Final Rules for Mortgage Loans—§ 226.36

Section 226.35, discussed above, applies certain new protections to higher-priced mortgage loans and HOEPA loans. In contrast, § 226.36 applies other new protections to mortgage loans generally, though only if secured by the consumer's principal dwelling. The final rule prohibits: (1) Creditors or mortgage brokers from coercing, influencing, or otherwise encouraging an appraiser to provide a misstated appraisal and (2) servicers from engaging in unfair fee and billing practices. The final rule neither adopts the proposal to require servicers to deliver a fee schedule to consumers upon request, nor the proposal to prohibit creditors from paying a mortgage broker more than the consumer had agreed in advance that the broker would receive. As with proposed § 226.35, § 226.36 does not apply to HELOCs.

The Board finds that the prohibitions in the final rule are necessary to prevent practices that the Board finds to be unfair, deceptive, associated with abusive lending practices, or otherwise not in the interest of the borrower. *See* TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), and the discussion of this statute in part V.A above. The Board also believes that the final rules will enhance consumers' informed use of credit. *See* TILA Sections 105(a), 102(a).

A. Creditor Payments to Mortgage Brokers—§ 226.36(a)

The Board proposed to prohibit a creditor from paying a mortgage broker in connection with a covered transaction more than the consumer agreed in writing, in advance, that the broker would receive. The broker would also disclose that the consumer ultimately would bear the cost of the entire compensation even if the creditor paid any part of it directly; and that a creditor's payment to a broker could influence the broker to offer the consumer loan terms or products that would not be in the consumer's interest or the most favorable the consumer could obtain.[101] Proposed commentary provided model language for the agreement and disclosures. The Board stated that it would test this language with consumers before determining how it would proceed on the proposal.

The Board tested the proposal with several dozen one-on-one interviews with a diverse group of consumers. On the basis of this testing and other information, the Board is withdrawing the proposal. The Board will continue to explore available options to address unfair acts or practices associated with originator compensation arrangements such as yield spread premiums. The Board is particularly concerned with arrangements that cause the incentives of originators to conflict with those of consumers, where the incentives are not transparent to consumers who rely on the originators for advice. As the Board comprehensively reviews Regulation Z, it will continue to consider whether disclosure or other approaches could be effective to address this problem.

Public Comment

The Board received over 4700 comments on the proposal. Mortgage brokers, their federal and state trade associations, the Federal Trade Commission, and several consumer groups argued that applying the proposed disclosures to mortgage brokers but not to creditors' employees who originate mortgages (''loan officers'') would reduce competition in the market and harm consumers. They contended that disclosing a broker's compensation would cause consumers to believe, erroneously, that a loan arranged by a broker would cost more than a loan originated by a loan officer. These commenters stated that many brokers would unfairly be forced out of business, and consumers would pay higher prices, receive poorer service, or have fewer options. The FTC, citing its published report of consumer testing of mortgage broker compensation disclosures, contended that focusing consumers' attention on the amount of the broker's compensation could confuse consumers and, under some circumstances, lead them to select a more expensive loan.

Mortgage brokers and some creditors expressed concerns that the proposed rule would not be practicable in cases where creditors forward applications to other creditors and where brokers decide to fund an application using a warehouse line of credit.

Consumer advocates, members of Congress, the FDIC, and others stated

[101] Creditors could demonstrate compliance with the proposed rule by obtaining a copy of the broker-consumer agreement and ensuring their payment to the broker does not exceed the amount stated in the agreement. The proposal would provide creditors two alternative means to comply, one where the creditor complies with a state law that provides consumers equivalent protection, and one where a creditor can demonstrate that its payments to a mortgage broker are not determined by reference to the transaction's interest rate.

that the proposal would not address the conflict of interest between consumers and brokers that rate-based compensation of brokers (the yield spread premium) can cause. These commenters urged that the only effective remedy for the conflict is to ban this form of compensation. State regulators expressed concern that the proposed disclosures would not provide consumers sufficient information, and could give brokers a legal ''shield'' against claims they acted contrary to consumers' interests.

Creditors and their trade associations, on the other hand, generally supported the proposal, although with a number of suggested modifications. These commenters agreed with the Board that yield spread premiums create financial incentives for brokers to steer consumers to less beneficial products and terms. They saw a need for regulation to remove or limit these incentives.

Commenters generally did not believe the proposed alternatives for compliance (where a state law provides substantially equivalent protections or where a creditor can show that the compensation amount is not tied to the interest rate) were feasible. Creditors and mortgage brokers stated that both alternatives were vague and would be little used. Consumer advocates believed the alternatives would likely create loopholes in the rule.

Comments on specific issues are discussed in more detail below as appropriate.

Discussion

The proposal was intended to limit the potential for unfairness, deception, and abuse in yield spread premiums while preserving the ability of consumers to cover their payments to brokers through rate increases. Creditor payments to brokers based on the interest rate give brokers an incentive to provide consumers loans with higher interest rates. Many consumers are not aware of this incentive and may rely on the broker as a trusted advisor to help them navigate the complexities of the mortgage application process.

The proposal sought to reduce the incentive of the broker to increase a consumer's rate and increase the consumer's leverage to negotiate with the broker. Under the proposal, creditor payments to brokers would be conditioned on a broker's advance commitment to a specified compensation amount. The proposal would require the agreement to be entered into before an application was submitted by a consumer or prior to the payment of any fee, whichever occurred earlier. Requiring an agreement before a fee or application would help ensure the compensation was set as independently as possible of loan's rate and other terms, and that the consumer would not feel obligated to proceed with the transaction. The Board also anticipated that the proposal would increase transparency and improve competition in the market for brokerage services, which could lower the price of these services, improve the quality of those services, or both.

Reasons for withdrawal. Based on the Board's analysis of the comments, consumer testing, and other information, the Board is withdrawing the proposal. The Board is concerned that the proposed agreement and disclosures would confuse consumers and undermine their decision-making rather than improve it. The risks of consumer confusion arise from two sources. First, an institution can act as either creditor or broker depending on the transaction; as explained below, this could render the proposed disclosures inaccurate and misleading in some, possibly many, cases of both broker and creditor originations. Second, consumers who participated in one-on-one interviews about the proposed agreement and disclosures often concluded, erroneously, that brokers are categorically more expensive than creditors or that brokers would serve their best interests notwithstanding the conflict resulting from the relationship between interest rates and brokers' compensation.

Dual roles. Mortgage brokers and creditors noted that creditors and brokers often play one of two roles. That is, an institution that is ordinarily a creditor and originates loans in its name may determine that it cannot approve an application based on its own underwriting criteria and present it to another creditor for consideration. This practice is known as ''brokering out.'' The institution brokering out an application would be a mortgage broker under the proposed rule; to receive compensation from the creditor, it would have to execute the required agreement and provide the required disclosures.

The proposal requires a broker to enter an agreement and give disclosures before the consumer submits an application, but an institution often may not know whether it will be a broker or a creditor for that consumer until it receives and evaluates the application. An institution that is ordinarily a creditor but sometimes a broker would have to enter into the agreement and give the disclosures for all consumers that seek to apply. In many cases, however, the institution will originate the loan as a creditor and not switch to being a broker. In these cases, the agreement and disclosures, which describe the institution as a broker and state its compensation as if it were brokering the transaction, would likely mislead and confuse the consumer. This problem also arises, if less frequently, when an institution that ordinarily brokers instead acts as creditor on occasion. On those occasions, the disclosures also would likely be misleading and confusing.

The source of the problem is the proposed requirement that the agreement be signed and disclosures given before the consumer has applied for a loan or paid a fee. The Board considered permitting post-application execution and disclosure by institutions that perform dual roles. The proposed timing, however, was intended to ensure that a consumer would be apprised of the broker's compensation and understand the broker's role before becoming, or feeling, committed to working with the broker. Accordingly, the Board concluded that providing this information later in the loan transaction would seriously undermine the proposal's objective of empowering the consumer to shop and negotiate.

Consumer testing. Consumer testing also suggested that at least some aspects of the proposal could confuse and mislead consumers. After publishing the proposal, a Board contractor, Macro International, Inc. (''Macro''), conducted in-depth one-on-one interviews with a diverse group of several dozen consumers who recently had obtained a mortgage loan.[102] Macro developed and tested a form in which the broker would agree to a specified total compensation and disclose (i) that any part of the compensation paid by the creditor would cost the consumer a higher interest rate, and (ii) that creditor payments to brokers based on the rate create a conflict of interest between mortgage brokers and consumers. Throughout the testing, revisions were made to the form in an effort to improve comprehension. The testing revealed two difficulties with the forms tested.

First, the form's statements that the consumer would pay the broker through a higher rate and that the broker had a conflict of interest confused many participants. Many participants stated, upon reading the disclosure, that if they agreed to pay the compensation the broker was asking, then the broker

[102] For more details on the consumer testing, see Macro's report, *Consumer Testing of Mortgage Broker Disclosures*, (July 10, 2008), available at *http://www.federalreserve.gov*.

would be obliged to find them the lowest interest rate and best terms available. Many participants reached this conclusion despite the clear statement in the form tested that brokers can increase their compensation by increasing the interest rate.

Second, many first-round participants stated or implied after reading the form that working through a broker would cost them more than working directly with a lender, which is not necessarily true. A new provision was added to the disclosure stating that lenders' employees are paid the same types of rate-based commissions as brokers and have the same conflict of interest. Many participants, however, continued to voice a belief that brokered loans must cost more than direct loans.

The results of testing indicate that consumers did not sufficiently understand some major aspects of the proposed disclosures. On the one hand, the disclosures could cause consumers to believe that mortgage brokers have obligations to them that the law does not actually impose. In consumer testing, this belief seemingly resulted from the disclosure of the fact that the consumer would pay the broker a commission, and it persisted notwithstanding the accompanying disclosure of the conflict of interest resulting from the rate-commission relationship. On the other hand, the disclosures could cause consumers to believe that retail loans are categorically less costly than brokered loans. Notwithstanding an explicit statement in the tested forms that commissions based on interest rates also are paid to loan officers, many participants voiced the belief that loan officers' commissions would be lower than brokers' commissions. They offered different reasons for this conclusion, including for example that the lender and not the consumer would pay the loan officer's commission.

Despite the difficulties with the disclosures observed in consumer testing, there were also some successes. For instance, consumers generally appeared to understand the language describing the potential conflict of interest, as noted above, even though it often was ignored because of seemingly conflicting information. In addition, language intended to convey to consumers the importance of shopping on their own behalf in the mortgage market appeared to be successful. These more encouraging results suggest that further development of a disclosure approach to creditor payments to mortgage originators, through additional consumer testing, still may have merit.

Conclusion. The Board considered whether it could resolve the problems described above by applying the proposal to the retail channel. The Board concluded, however, that substantial additional testing and analysis would be required to determine whether such an approach would be effective. Therefore, the Board is withdrawing the proposal. The Board will continue to explore available options to address potential unfairness associated with originator compensation arrangements such as yield spread premiums. As the Board comprehensively reviews Regulation Z, it will continue to consider whether disclosures or other approaches could effectively remedy this potential unfairness without imposing unintended consequences.

Definition of Mortgage Broker

In connection with the proposal relating to mortgage broker compensation and the proposal prohibiting coercion of appraisers, the Board proposed to define "mortgage broker" as a person, other than a creditor's employee, who for monetary gain arranges, negotiates, or otherwise obtains an extension of credit for a consumer. A person who met this definition would be considered a mortgage broker even if the credit obligation was initially payable to the person, unless the person funded the transaction from its own resources, from deposits, or from a bona fide warehouse line of credit. Commenters generally did not comment on the proposed definition.

Defining "mortgage broker" is still necessary, notwithstanding the Board's withdrawal of the proposed regulation of creditor payments to mortgage brokers, as mortgage brokers are subject to the prohibitions on coercion of appraisers, discussed below. The Board is adopting the definition of mortgage broker with a minor change to clarify that the term "mortgage broker" does not include a person who arranges, negotiates, or otherwise obtains an extension of credit for him or herself.

B. Coercion of Appraisers—§ 226.36(b)

The Board proposed to prohibit creditors and mortgage brokers and their affiliates from coercing, influencing, or otherwise encouraging appraisers to misstate or misrepresent the value of a consumer's principal dwelling. The Board also proposed to prohibit a creditor from extending credit when it knows or has reason to know, at or before loan consummation, that an appraiser has been encouraged by the creditor, a mortgage broker, or an affiliate of either, to misstate or misrepresent the value of a consumer's principal dwelling, unless the creditor acts with reasonable diligence to determine that the appraisal was accurate or extends credit based on a separate appraisal untainted by coercion. The Board is adopting the rule substantially as proposed. The Board has revised some of the proposed examples of conduct that violates the rule and conduct that does not violate the rule and has added commentary about when a misstatement of a dwelling's value is material.

Public Comment

Consumer and community advocacy groups, appraiser trade associations, state appraisal boards, individual appraisers, some financial institutions and banking trade associations, and a few other commenters expressed general support for the proposed rule to prohibit appraiser coercion. Several of these commenters stated that the rule would enhance enforcement against parties that are not subject to the same oversight as depository institutions, such as independent mortgage companies and mortgage brokers. Some of the commenters who supported the rule also suggested including additional practices in the list of examples of prohibited conduct. In addition, several appraiser trade associations jointly recommended that the Board prohibit appraisal management companies from coercing appraisers.

On the other hand, community banks, consumer banking and mortgage banking trade associations, and some large financial institutions opposed the proposed rule, stating that its adoption would lead to nuisance suits by borrowers who regret the amount they paid for a house and would make creditors liable for the actions of mortgage brokers and appraisers. Several of these commenters stated that the Board's rule would duplicate requirements set by existing laws and guidance, including federal regulations, interagency guidelines, state laws, and the Uniform Standards of Professional Appraisal Practice (USPAP). Further, some of these commenters stated that creditors have limited ability to detect undue influence and should be held liable only if they extend credit knowing that a violation of § 226.36(b)(1) had occurred.

Many commenters discussed appraisal-related agreements that Fannie Mae and Freddie Mac have entered into with the Attorney General of New York and the Office of Federal Housing Enterprise Oversight (GSE Appraisal Agreements), which incorporated a

Home Valuation Code of Conduct. These commenters urged the Board to coordinate with the parties to the GSE Appraisal Agreements to promote consistency in the standards that apply to the residential appraisal process.

The comments are discussed in greater detail below.

Discussion

The Board finds that it is an unfair practice for creditors or mortgage brokers to coerce, influence, or otherwise encourage an appraiser to misstate the value of a consumer's principal dwelling. Accordingly, the Board is adopting the rule substantially as proposed.

Substantial injury. Encouraging an appraiser to overstate or understate the value of a consumer's dwelling causes consumers substantial injury. An inflated appraisal may cause consumers to purchase a home they otherwise would not have purchased or to pay more for a home than they otherwise would have paid. An inflated appraisal also may lead consumers to believe that they have more home equity than in fact they do, and to borrow or make other financial decisions based on this incorrect information. For example, a consumer who purchases a home based on an inflated appraisal may overestimate his or her ability to refinance and therefore may take on a riskier loan. A consumer also may take out more cash with a refinance or home equity loan than he or she would have had an appraisal not been inflated. Appraiser coercion thus distorts, rather than enhances, competition. Though perhaps less common than overstated appraisals, understated appraisals can cause consumers to be denied access to credit for which they qualified.

Inflated or understated appraisals of homes concentrated in a neighborhood may affect appraisals of neighboring homes, because appraisers factor into a property valuation the value of comparable properties. For the same reason, understated appraisals may affect appraisals of neighboring properties. Therefore, inflating or deflating appraised value can harm consumers other than those who are party to the transaction with the misstated appraisal.

Injury not reasonably avoidable. Consumers who are party to a consumer credit transaction cannot prevent creditors or mortgage brokers from influencing appraisers to misstate or misrepresent a dwelling's value. Creditors and mortgage brokers directly or indirectly select and contract with the appraisers that value a dwelling for a consumer credit transaction. Consumers will not necessarily be aware that a creditor or mortgage broker is pressuring an appraiser to misstate or misrepresent the value of the principal dwelling they offer as collateral for a loan. Furthermore, consumers who own property near a dwelling securing a consumer credit transaction but are not parties to the transaction are not in a position to know that a creditor or mortgage broker is coercing an appraiser to misstate a dwelling's value. Consumers thus cannot reasonably avoid injuries that result from creditors' or mortgage brokers' coercing, influencing, or encouraging an appraiser to misstate or misrepresent the value of a consumer's principal dwelling.

Injury not outweighed by benefits to consumers or to competition. The Board finds that the practice of coercing, influencing, or otherwise encouraging appraisers to misstate or misrepresent value does not benefit consumers or competition. Acts or practices that promote the misrepresentation of the market value of a dwelling distort the market, and any competitive advantage a creditor or mortgage broker obtains through influencing an appraiser to misstate a dwelling's value, or that a creditor gains by knowingly originating loans based on a misstated appraisal, is an unfair advantage.

For the foregoing reasons, the Board finds that it is an unfair practice for a creditor or mortgage broker to coerce, influence, or otherwise encourage an appraiser to misstate the value of a consumer's principal dwelling. As discussed in part V.A above, the Board has broad authority under TILA Section 129(l)(2) to adopt regulations that prohibit, in connection with mortgage loans, acts or practices that the Board finds to be unfair or deceptive. 15 U.S.C. 1639(l)(2). Therefore, the Board may adopt regulations prohibiting unfair or deceptive practices by mortgage brokers who are not creditors and unfair or deceptive practices that are ancillary to the origination process, when such practices are "in connection with mortgage loans." Because appraisals play an important role in a creditor's decision to extend mortgage credit as well as the terms of such credit, the Board believes that it fits well within the Board's authority under Section 129(l)(2) to prohibit creditors and mortgage brokers from coercing, influencing, or otherwise encouraging an appraiser to misstate the value of a consumer's principal dwelling and creditors from extending credit based on an appraisal when they know that prohibited conduct has occurred. Therefore, the Board issues the final rule prohibiting such acts under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2).

The Final Rule

The Board requested comment on the potential costs and benefits of its proposed appraiser coercion regulation. Some securitization trade associations and financial institutions stated that creditors obtain appraisals for their own benefit, to determine whether to extend credit and the terms of credit extended. The Board recognizes that, because appraisals provide evidence of the collateral's sufficiency to avoid losses if a borrower defaults on a loan, creditors have a disincentive to coerce appraisers to misstate value. However, loan originators may believe that they stand to benefit from coercing an appraiser to misstate value, for example, if their compensation depends more on volume of loans originated than on loan performance. Despite the disincentives cited by some commenters, there is evidence that coercion of appraisers is not uncommon, and may even be widespread.[103]

A few large banks and a financial services trade association suggested that the Board prohibit mortgage brokers from ordering appraisals, as the GSE Appraisal Agreements do. The Board declines to determine that any particular procedure for ordering an appraisal necessarily promotes false reporting of value. As discussed above, the Board finds that coercion of appraisers by creditors or by mortgage brokers is an unfair practice. Therefore, the final rule prohibits actions by creditors and mortgage brokers that are aimed at pressuring appraisers to misstate the value of a consumer's principal dwelling.

In addition, some commenters stated that the Board's rule would be redundant given the existence of USPAP. USPAP, however, establishes uniform rules regarding preparation of appraisals and addresses the conduct of appraisers, not the conduct of creditors or mortgage brokers. The federal financial institution regulatory agencies have issued to the institutions they supervise regulations and guidance that set forth standards for the policies and procedures institutions should implement to enable appraisers to exercise independent judgment when

[103] For example, the October Research Corporation's 2007 National Appraisal Survey (released in Dec. 2006) found that appraisers reported being pressured to restate, adjust, or change reported property values by mortgage brokers (71 percent), real estate agents (56 percent), consumers (35 percent), lenders (33 percent), and appraisal management companies (25 percent).

valuing a property.[104] For example, these regulations prohibit staff and fee appraisers from having any direct or indirect interest, financial or otherwise, in a subject property; fee appraisers also may not have any such interest in the subject transaction.[105] Unlike the Board's rule, however, these federal regulations do not apply to all institutions. Moreover, these federal rules are part of an overarching framework of regulation and supervision of federally insured depository institutions and are not necessarily appropriate for application to independent mortgage companies and mortgage brokers.

Some state legislatures have prohibited coercion of appraisers or enacted general laws against mortgage fraud that may be used to combat appraiser coercion.[106] Not every state, however, has passed laws equivalent to the final rule. Prohibiting creditors and mortgage brokers from pressuring appraisers to misstate or misrepresent the value of a consumer's principal dwelling provides enforcement agencies in every state with a specific legal basis for an action alleging appraiser coercion. Though states are able to take enforcement action against certain institutions that are believed to engage in appraisal abuses,[107] some state laws are preempted as to other creditors. The final rule, adopted under HOEPA, applies equally to all creditors.

In response to the Board's request for comment about the proposed rule's provisions, commenters addressed three main topics: (1) The terms used to describe prohibited conduct; (2) the specific examples of conduct that is prohibited and conduct that is not prohibited; and (3) the proscription on extending credit where a creditor knows about prohibited conduct.

Prohibited conduct. Some commenters recommended that the Board replace the phrase ''coerce, influence, or otherwise encourage'' with ''coerce, bribe, or extort.'' These commenters stated that the words ''influence'' and ''encourage'' are vague and subjective, whereas the words ''bribe'' and ''extort'' would provide bright-line standards for compliance. Like the proposed rule, the final rule prohibits a creditor or mortgage broker from coercing, influencing, or otherwise encouraging an appraiser to misstate the value of a dwelling. The final rule does not limit prohibited conduct to bribery or extortion. Creditors and mortgage brokers may act in ways that would not constitute bribery or extortion but that nevertheless improperly influence an appraiser's valuation of a dwelling. These actions can visit the same harm on consumers as do bribery or extortion, and thus they are prohibited by the final rule. The Board believes that commenters' concerns about the clarity of the terms used in the final rule can be addressed through the examples of conduct that is prohibited and conduct that is not prohibited discussed below.

Examples of conduct prohibited and conduct not prohibited. The proposal offered several examples of conduct that would violate the rule and conduct that would not violate the rule. The Board is adopting the proposed examples of prohibited conduct and adding two new examples of prohibited conduct. The Board also is adopting all but one of the proposed examples of conduct that is not prohibited.

Some commenters requested that additional actions be listed as examples that violate the rule, such as:

- Excluding an appraiser from a list of ''approved'' appraisers because the appraiser had valued properties at an amount that had jeopardized or prevented the consummation of loan transactions.
- Telling an appraiser a minimum acceptable appraised value.
- Providing an appraiser with the price stated in a contract of sale.
- Suggesting that an appraiser consider additional properties as comparable to the subject property, after an appraiser has submitted an appraisal report.

Final § 226.36(b)(1) prohibits conduct that coerces, influences, or encourages an appraiser to misstate or misrepresent the value of a consumer's principal dwelling, and the list of examples the section provides is illustrative and not exhaustive. The Board believes that it is not necessary or possible to list all conceivable ways in which creditors or mortgage brokers could pressure appraisers to misstate a principal dwelling's value. However, the Board has added two examples to enhance the list in § 226.36(b)(1). The final rule does not limit the ability of a creditor or broker to terminate a relationship with an appraiser for legitimate reasons.

Examples of prohibited conduct. The Board is adopting the proposed examples of prohibited conduct and adding two examples. The first added example is a creditor's or broker's exclusion of an appraiser from consideration for future engagement due to the appraiser's failure to report a value that meets or exceeds a minimum threshold. This example is adapted from a statement in the supplementary information to the proposed rule. 73 FR 1701. The second added example is telling an appraiser a minimum reported value of a consumer's principal dwelling that is needed to approve the loan. This example is consistent with the position of the Appraisal Standards Board (ASB), which develops, interprets and amends USPAP, that assignments should not be contingent on the reporting of a predetermined opinion of value.[108]

The Board is not adopting other examples of prohibited conduct suggested by commenters. Some commenters urged the Board to prohibit a creditor or mortgage broker from omitting or removing an appraiser's name from a list of approved appraisers, where the appraiser has not valued a property at the desired amount. The Board believes such conduct is encompassed in the examples provided in § 226.36(b)(1)(i)(B) and (C).

Some commenters also requested that the Board add, as an example of a violation, a creditor's or mortgage broker's provision to an appraiser of the contract of sale for the principal dwelling. The Board is not adopting the example. USPAP Standard Rule 1–5 requires an appraiser to analyze all agreements of sale for a subject property, and Standard Rule 2–2 requires disclosure of information contained in such agreements or an explanation of why such information is unobtainable or irrelevant.

[104] *See, e.g.*, 12 CFR part 208 subpart E and app. C, and 12 CFR part 225 subpart G (Board); 12 CFR part 34, subparts C and D (Office of the Comptroller of the Currency (OCC)); 12 CFR part 323 and 12 CFR part 365 (FDIC); 12 CFR part 564, 12 CFR 560.100, and 12 CFR 560.101 (Office of Thrift Supervision (OTS)); and 12 CFR 722.5 (National Credit Union Administration (NCUA)). Applicable federal guidance the Board, OCC, FDIC, OTS, and NCUA have issued includes Independent Appraisal and Evaluation Functions, dated October 28, 2003, and Interagency Appraisal and Evaluation Guidelines, dated October 27, 1994.

[105] 12 CFR 225.65 (Board); 12 CFR 34.45 (OCC); 12 CFR 323.5 (FDIC); 12 CFR 564.5 (OTS); and 12 CFR 722.5 (NCUA).

[106] *See, e.g.*, Colo. Rev. Stat. § 6–1–717; Iowa Code § 543D.18A; Ohio Rev. Code Ann. §§ 1322.07(G), 1345.031(B), 4763.12(E).

[107] For example, in 2006, 49 states and the District of Columbia (collectively, the Settling States) entered into a settlement agreement with ACC Capital Holdings Corporation and several of its subsidiaries, including Ameriquest Mortgage Company (collectively, the Ameriquest Parties). The Settling States alleged that the Ameriquest Parties had engaged in deceptive or misleading acts that resulted in the Ameriquest Parties' obtaining inflated appraisals of homes' value. *See, e,g., Iowa ex rel Miller* v. *Ameriquest Mortgage Co.*, No. 05771 EQCE–053090 (Iowa D. Ct. 2006) (Pls. Pet. 5). To settle the complaints, the Ameriquest Parties agreed to abide by policies designed to ensure appraiser independence and accurate valuations.

[108] *See, e.g.*, ASB Advisory Opinion No. 19, Unacceptable Assignment Conditions in Real Property Appraisal Assignments.

Examples of conduct that is not prohibited. The final rule adopts the proposed examples of prohibited conduct with one change. The Board is not adopting proposed § 226.36(b)(1)(ii)(F), which would have provided that the rule would not be violated when a creditor or mortgage broker terminates a relationship with an appraiser for violations of applicable federal or state law or breaches of ethical or professional standards. Some commenters noted that there are other legitimate reasons for terminating a relationship with an appraiser, and they requested that the Board include these as examples of conduct that is not prohibited so that the provision would not be read as implicitly prohibiting them. The Board believes that it is not feasible to list all of the legitimate reasons a creditor or broker might terminate a relationship with an appraiser. Accordingly, the Board is not adopting proposed § 226.36(b)(1)(ii)(F).

Some commenters suggested that the Board delete, from the examples of conduct that is not prohibited, asking an appraiser to consider additional information about a consumer's principal dwelling or about comparable properties. Although in some cases a post-report request that an appraiser consider additional information may be a subtle form of pressure to change a reported value, in other cases such a request could reflect a legitimate desire to improve an appraisal report. Furthermore, federal interagency guidance directs institutions to return deficient reports to appraisers for correction and to replace unreliable appraisals or evaluations prior to the final credit decision.[109] Therefore, the Board is not deleting, from the examples of conduct that is not prohibited, asking an appraiser to consider additional information about a consumer's principal dwelling or about comparable properties. However, § 226.36(b) prohibits creditors and mortgage brokers from making such requests in order to coerce, influence, or otherwise encourage an appraiser to misstate or misrepresent the value of a dwelling.

Extension of credit. As proposed, § 226.36(b)(2) provided that a creditor is prohibited from extending credit if the creditor knows or has reason to know, at or before loan consummation, of a violation of § 226.36(b)(1) (for example, by an employee of the creditor or a mortgage broker), unless the creditor acted with reasonable diligence to determine that the appraisal does not materially misstate the value of the consumer's principal dwelling. The proposed comment to § 226.36(b)(2) stated that a creditor is deemed to have acted with reasonable diligence if the creditor extends credit based on an appraisal other than the one subject to the restriction.

The Board is adopting the text of § 226.36(b)(2) and the associated commentary substantially as proposed. Some financial institutions and financial institution trade associations stated that the phrase ''reason to know'' is vague and that creditors should be held liable for violations only if they extend credit when they had actual knowledge that a violation of § 226.36(b)(1) exists. The final rule prohibits ''a creditor who knows, at or before loan consummation, of a violation of § 226.36(b)(1) in connection with an appraisal'' from extending credit based on that appraisal, unless the creditor acts with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of the consumer's principal dwelling. Although final § 226.36(b)(2) does not include the phrase ''reason to know'' included in the proposed rule, the final rule's knowledge standard is not intended to permit willful disregard of violations of § 226.36(b)(1). The Board also is adopting new commentary regarding how to determine whether a misstatement of value is material.

Many banks asked for guidance on how to determine whether an appraisal ''materially'' misstates a dwelling's value. In response to these comments, the Board is adopting a new comment to § 226.36(b)(2) that provides that a misrepresentation or misstatement of a dwelling's value is not material if it does not affect the credit decision or the terms on which credit is extended. The Board notes that existing appraisal regulations and guidance may direct creditors to take certain steps in the event the creditor knows about problems with an appraisal. For example, the Interagency Appraisal and Evaluation Guidelines dated Oct. 28, 1994 direct institutions to return deficient reports to appraisers and persons performing evaluations for correction and to replace unreliable appraisals or evaluations prior to making a final credit decision. These guidelines further state that changes to an appraisal's estimate of value are permitted only as a result of a review conducted by an appropriately qualified state-licensed or -certified appraiser in accordance with Standard III of USPAP.

The final rule does not dictate specific due diligence procedures for creditors to follow when they suspect a violation of § 226.36(b)(2), however. In addition, the Board does not intend for § 226.36(b)(2) to create grounds for voiding loan agreements where violations are found. That is, if a creditor knows of a violation of § 226.36(b)(1), and nevertheless extends credit in violation of § 226(b)(2), while the creditor will have violated § 226.36(b)(2), this violation does not necessarily void the consumer's loan agreement with the creditor. Whether the loan agreement is void is a matter determined by State or other applicable law.

C. Servicing Abuses—§ 226.36(c)

The Board proposed to prohibit certain practices of servicers of closed-end consumer credit transactions secured by a consumer's principal dwelling. Proposed § 226.36(d) provided that no servicer shall: (1) Fail to credit a consumer's periodic payment as of the date received; (2) impose a late fee or delinquency charge where the late fee or delinquency charge is due only to a consumer's failure to include in a current payment a late fee or delinquency charge imposed on earlier payments; (3) fail to provide a current schedule of servicing fees and charges within a reasonable time of request; or (4) fail to provide an accurate payoff statement within a reasonable time of request. The final rule, redesignated as § 226.36(c), adopts the proposals regarding prompt crediting, fee pyramiding, and payoff statements, and modifies and clarifies the accompanying commentary. The Board is not adopting the fee schedule proposal, for the reasons discussed below.

Public Comment

Consumer advocacy groups, federal and state regulators and officials, consumers, and others strongly supported the Board's proposal to address servicing abuses, although some urged alternative measures to address servicer abuses, including requiring loss mitigation. Industry commenters, on the other hand, were generally opposed to certain aspects of the proposals, particularly the fee schedule. Industry commenters also urged the Board to adopt any such rules under its authority in TILA Section 105(a) to adopt regulations to carry out the purposes of TILA, and not under Section 129(l)(2). Commenters also requested several clarifications.

Prompt crediting. Commenters generally favored, or did not oppose, the prompt crediting rule. In particular, consumer advocacy groups, federal and state regulators and officials, and others supported the rule. However, some industry commenters and others

[109] *See* Interagency Appraisal and Evaluation Guidelines, SR 94–55 (FIS) (Oct. 24, 1994) at 9.

requested clarification on certain implementation details. Commenters also disagreed about whether and how to address partial payments.

Fee pyramiding. Commenters generally supported prohibiting late fee pyramiding. Several industry commenters argued, however, that a new rule would be unnecessary because servicers are subject to a prohibition on pyramiding under other regulations.

Fee schedule. Most commenters opposed the fee schedule proposal. One consumer advocate group criticized the disclosure's utility where consumers cannot shop for and select servicers. Other consumer advocates urged the Board to adopt alternative measures they argued would be more effective to combat fee abuses. Industry commenters also objected to the proposal as impracticable and unnecessarily burdensome. Most industry commenters strongly opposed disclosure of third party fees, particularly because third party fees can vary greatly and may be indeterminable in advance.

Payoff statements. Consumer advocates strongly supported the proposal to require provision of payoff statements within a reasonable time. The proposed commentary stated that it would be reasonable under normal market conditions to provide statements within three business days of receipt of a consumer's request. Community banks stated that three business days would typically be adequate. However, large financial institutions and their trade associations urged the Board to adopt a longer time period in the commentary. These commenters also requested other clarifications. The comments are discussed in more detail throughout this section, as applicable.

Discussion

As discussed in the preamble to the proposed rule, the Board shares concerns about abusive servicing practices. Consumer advocates raised abusive mortgage servicer practices as part of the Board's 2006 and 2007 hearings as well as in recent congressional hearings.[110] Servicer abuses have also received increasing attention both in academia and the press.[111] In particular, consumer advocates have raised concerns that some servicers may be charging consumers unwarranted or excessive fees (such as late fees and other ''service'' fees) and may be improperly submitting negative credit reports, in the normal course of mortgage servicing as well as in foreclosures. Some of these abusive fees, they contend, result from servicers' failure to promptly credit consumers' accounts, or when servicers pyramid late fees. In addition to anecdotal evidence of significant consumer complaints about servicing practices, abusive practices have been cited in a variety of court cases.[112] In 2003, the FTC announced a $40 million settlement with a large mortgage servicer and its affiliates to address allegations of abusive behavior.[113]

Consumer advocates have also raised concerns that consumers are sometimes unaware of fees charged, or unable to understand the basis upon which fees are charged. This may occur because servicers often do not disclose precise fees in advance; some consumers are not provided any other notice of fees (such as a monthly statement or other after-the-fact notice); and when consumers are provided a statement or other fee notice, fees may not be itemized or detailed. For example, in a number of bankruptcy cases, servicers have improperly assessed post-petition fees without notifying either the consumer or the court.[114] Similarly, because payoff statements lack transparency (in that they do not provide detailed accounting information) and because consumers are often unaware of the exact amount owed, some servicers may assess inaccurate or false fees on the payoff statement.[115]

Substantial injury. Consumers subject to the servicer practices described above suffer substantial injury. For example, one state attorney general and several consumer advocates stated that failure to properly credit payments is one of the most common problems consumers have with servicers. Servicers that do not timely credit, or that misapply, payments cause the consumer to incur late fees where none should be assessed.[116] Even where the first late fee is properly assessed, servicers may apply future payments to the late fee first. Doing so results in future payments being deemed late even if they are, in fact, paid in full within the required time period, thus permitting the servicer to charge additional late fees—a practice commonly referred to as ''pyramiding'' of late fees. These practices can cause the account to appear to be in default, and thus can give rise to charging excessive or unwarranted fees to consumers, who may not even be aware of the default or fees if they do not receive statements. Once consumers are in default, these practices can make it difficult for consumers to catch up on payments. These practices also may improperly trigger negative credit reports, which can cause consumers to be denied other credit or pay more for such credit, and

[110] *See, e.g.*, Comment letter of the National Consumer Law Center to Docket No. OP–1253 (Aug. 15, 2006) at 11; *Legislative Proposals on Reforming Mortgage Practices, Hearing Before the H. Comm. On Fin. Servs.,* 110th Cong. 74 (2007) (Testimony of John Taylor, National Community Reinvestment Coalition).

[111] *See, e.g.*, Paula Fitzgerald Bone, *Toward a General Model of Consumer Empowerment and Welfare in Financial Markets with an Application to Mortgage Servicers,* 42 Journal of Consumer Affairs 165 (Summer 2008); Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims,* University of Iowa Legal Study Research Paper No. 07–29 (Nov. 2007); Kevin McCoy, *Hitting Home: Homeowners Fight for their Mortgage Rights,* USA Today (June 25, 2008), available at *http://www.usatoday.com/money/industries/banking/2008-06-25-mortgage-services-countrywide-lawsuit_N.htm*; Mara Der Hovanesian, *The ''Foreclosure Factories'' Vise,* BusinessWeek.com (Dec. 25, 2006), available at *http://www.businessweek.com/magazine/content/06_52/b4015147.htm?chan=search.*

[112] *See, e.g., Workman* v. *GMAC Mortg. LLC (In re Workman),* 2007 Bankr. LEXIS 3887 (Bankr. D. S.C. Nov. 21, 2007) (servicer held in civil contempt for, among other things, failure to promptly credit payments made before discharge from bankruptcy and charging of unauthorized late and attorneys fees); *Islam* v. *Option One Mortgage Corp.,* 432 F. Supp. 2d 181 (D. Mass 2006) (servicer allegedly continued to report borrower delinquent even after receiving the full payoff amount for the loan); *In Re Gorshstein,* 285 B.R. 118 (S.D.N.Y. 2002) (servicer sanctioned for falsely certifying that borrowers were delinquent); *Rawlings* v. *Dovenmuehle Mortgage Inc.,* 64 F. Supp. 2d 1156 (M.D. Ala. 1999) (servicer failed for over 7 months to correct account error despite borrowers' twice sending copies of canceled checks evidencing payments, resulting in unwarranted late and other fees); *Ronemus* v. *FTB Mortgage Servs.,* 201 B.R. 458 (1996) (among other abuses, servicer failed to promptly credit payments and instead paid them into a ''suspense'' account, resulting in unwarranted late fees and unnecessary and improper accrual of interest on the note).

[113] Consent Order, *United States* v. *Fairbanks Capital Corp.,* Civ. No. 03–12219–DPW (D. Mass Nov. 21, 2003, as modified Sept. 4, 2007). *See also Ocwen Federal Bank FSB,* Supervisory Agreement, OTS Docket No. 04592 (Apr. 19, 2004) (settlement resolving mortgage servicing issues).

[114] *See, e.g., Jones* v. *Wells Fargo (In re Jones)*, 366 B.R. 584 (E.D. La 2007) (''In this Court's experience, few, if any, lenders make the adjustments necessary to properly account for a reorganized debt repayment plan. As a result, it is common to see late charges, fees, and other expenses assessed to a debtor's loan as a result of post-petition accounting mistakes made by lenders.''). *See also Payne* v. *Mortg. Elec. Reg. Sys. (In re Payne),* 2008 Bankr. LEXIS 1340 (Bankr. Kan. May 6, 2008); *Sanchez* v. *Ameriquest (In re Sanchez),* 372 B.R. 289 (S.D. Tx. 2007); *Harris* v. *First Union Mortg. Corp. (In re Harris),* 2002 Bankr. LEXIS 771 (Bankr. D. Ala. 2002); *In Re Tate,* 253 B.R. 653.

[115] *See, e.g., Maxwell* v. *Fairbanks Capital Corp. (In re Maxwell),* 281 B.R. 101, 114 (D. Mass 2002) (servicer ''repeatedly fabricated the amount of the Debtor's obligation to it out of thin air'').

[116] *See, e.g. Holland* v. *GMAC Mortg. Corp.,* 2006 U.S. Dist. LEXIS 25723 (D. Kan. 2006) (servicer's misapplication of borrower's payment to the wrong account resulted in improper late fees and negative credit reports, despite borrower's proof of canceled checks); *In re Payne*, 2008 Bankr. LEXIS at *30 (servicer's failure to properly and timely account for payments and failure to distinguish between pre-petition and post-petition payments caused its accounting system and payment history to improperly show borrowers as delinquent in their payments).

require consumers to engage in time-consuming credit report correction efforts.

In addition, a servicer's failure to provide accurate payoff statements in a timely fashion can cause substantial injury to consumers. One state attorney general commented that its office often receives complaints about unreasonable delays in the provision of payoff statements. Consumers may want to refinance a loan to obtain a lower interest rate or to avoid default or foreclosure, but may be impeded from doing so due to inaccurate or untimely payoff statements. These consumers thus incur additional costs and may be subject to financial problems or even foreclosure. In addition to the injuries caused by delayed payoff statements, consumers are injured by inaccurate payoff statements. As described above, some servicers assess inaccurate or false fees on the payoff statement without the consumer's knowledge. Even when the consumer requests clarification, a servicer may provide an invalid accounting of fees or charges.[117] Or, a servicer may provide the payoff statement too late in the refinancing process for the consumer to obtain clarification without risking losing his or her new loan commitment.[118]

Injury not reasonably avoidable. The injuries caused by servicer abuses are not reasonably avoidable because market competition is not adequate to prevent abusive practices, particularly when mortgages are securitized and servicing rights are sold. Historically, under the mortgage loan process, a lender would often act as both originator and collector—that is, it would service its own loans. Although some creditors sold servicing rights, they remained vested in the customer service experience in part due to reputation concerns and in part because payment streams continued to flow directly to them. However, with rise of the ''originate to distribute'' model discussed in part II.B above, the original creditor has become removed from future direct involvement in a consumer's loan, and thus has less incentive and ability to detect or deter servicing abuses or respond to consumer complaints about servicing abuses. When loans are securitized, servicers contract directly with investors to service the loan, and consumers are not a party to the servicing contract.

Today, separate servicing companies play a key role: they are chiefly responsible for account maintenance, including collecting payments, remitting amounts due to investors, handling interest rate adjustments on variable rate loans, and managing delinquencies and foreclosures. Servicers also act as the primary point of contact for consumers after origination, because in most cases the original creditor has securitized and sold the loan shortly after origination. In exchange for performing these services, servicers generally receive a fixed per-loan or monthly fee, float income, and ancillary fees—including default charges—that consumers must pay.

Investors are principally concerned with maximizing returns on the mortgage loans and are generally indifferent to the fees the servicer charges the consumer so long as the fees do not reduce the investor's return (*e.g.*, by prompting an unwarranted foreclosure). Consumers are not able to choose their servicers. Consumers also are not able to change servicers without refinancing, which is a time-consuming, expensive undertaking. Moreover, if interest rates are rising, refinancing may only be possible if the consumer accepts a loan with a higher interest rate. After refinancing, consumers may find their loans assigned back to the same servicer as before, or to another servicer engaging in the same practices. As a result, servicers do not have to compete in any direct sense for consumers. Thus, there may not be sufficient market pressure on servicers to ensure competitive practices.[119]

Injury not outweighed by countervailing benefits to consumers or to competition. The injuries described above also are not outweighed by any countervailing benefits to consumers or competition. Commenters did not cite, and the Board is not aware of, any benefit to consumers from delayed crediting of payments, pyramided fees, or delayed issuance of payoff statements.

For these reasons, the Board finds the acts and practices prohibited under § 226.36(c) for closed-end consumer credit transactions secured by a consumer's principal dwelling to be unfair. As described in part V.A above, TILA Section 129(l)(2) authorizes protections against unfair practices ''in connection with mortgage loans'' that the Board finds to be unfair or deceptive. 15 U.S.C. 1639(l)(2). Therefore, the Board may take action against unfair or deceptive practices by non-creditors and against unfair or deceptive practices outside of the origination process, when such practices are ''in connection with mortgage loans.'' The Board believes that unfair or deceptive servicing practices fall squarely within the purview of Section 129(l)(2) because servicing is an integral part of the life of a mortgage loan and as such is ''in connection with mortgage loans.'' Accordingly, the final rule prohibits certain unfair or deceptive servicing practices under Section 129(l)(2), 15 U.S.C. 1639(l)(2).

The Final Rule

Section 226.36(c) prohibits three servicing practices. First, the rule prohibits a servicer from failing to credit a payment to a consumer's account as of the date received. Second, the rule prohibits ''pyramiding'' of late fees by prohibiting a servicer from imposing a late fee on a consumer for making a payment that constitutes the full amount due and is timely, but for a previously assessed late fee. Third, the rule prohibits a servicer from failing to provide, within a reasonable time after receiving a request, an accurate statement of the amount currently required to pay the obligation in full, often referred to as a payoff statement. Under § 226.36(c)(3), the term ''servicer'' and ''servicing'' are given the same meanings as provided in Regulation X, 24 CFR 3500.2. As described in more detail below, the Board is not adopting the proposed rule that would prohibit a servicer from failing to provide to a consumer, within a reasonable time after receiving a request, a schedule of all fees and charges it imposes in connection with mortgage loans it services.

The Board recognizes that servicers will incur additional costs to alter their systems to comply with some aspects of the final rule. For example, in some instances some servicers may incur costs in investing in systems to produce payoff statements within a shorter period of time than their current technology affords. As a result, some servicers will, directly or indirectly, pass those costs on to consumers. The Board believes, however, that these costs to consumers are outweighed by

[117] *See, e.g., In re Maxwell,* 281 B.R. 101, 114 (D. Mass 2002).

[118] *See, e.g., In re Jones,* 366 B.R. at 587–588 (consumer in bankruptcy forced to remit improper sums demanded on payoff statement or lose loan commitment from new lender. ''Although Debtor questioned the amounts [servicer] alleged were due, he was unable to obtain an accounting from [servicer] explaining its calculations or any other substantiation for the payoff.'').

[119] In one survey, J.D. Power found that consumers whose loans have been sold have customer satisfaction scores 32 points lower than those who have remained with the loan originator. J.D. Power and Associates Reports: USAA Ranks Highest in Customer Satisfaction with Primary Mortgage Servicing. Press Release (July 19, 2006), available at *http://www.jdpower.com/corporate/news/releases/pdf/2006117.pdf.*

the consumer benefits provided by the rules as adopted.

Prompt Crediting

The Board proposed §§ 226.36(d)(1)(i) and 226.36(d)(2) to prohibit a servicer from failing to credit payments as of the date received. The proposed prompt crediting rule and accompanying commentary are substantially similar to the existing provisions requiring prompt crediting of payment on open-end transactions in § 226.10. The final rule adopts, as §§ 226.36(c)(1)(i) and 226.36(c)(2), the rule substantially as proposed, but with revisions to the proposed commentary to address the questions of partial payments and payment cut-off times. Commentary has also been added or modified in response to commenters' concerns.

Commenters generally favored, or did not oppose, the prompt crediting rule. In particular, consumer advocacy groups, federal and state regulators and officials, and others supported the rule. One state attorney general and several consumer advocacy groups stated that failure to properly credit payments is one of the most common servicing problems they see consumers face. However, as described in more detail below, some industry commenters and others requested clarification on certain implementation details. Commenters also generally disagreed on whether and how to address partial payments.

Method and timing of payments. Section 226.36(c)(1)(i) requires a servicer to credit a payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, or except as provided in § 226.36(c)(2). Many industry commenters, as well as the GSEs requested clarifications on the timing and method of crediting payments, and the final staff commentary has been revised accordingly.

For example, final comment 36(c)(1)(i)–1 makes clear that the rule does not require a servicer to physically enter the payment on the date received, but requires only that it be credited as of the date received. The proposed comment explained that a servicer does not violate the rule if it receives a payment on or before its due date and enters the payment on its books or in its system after the due date if the entry does not result in the imposition of a late charge, additional interest, or similar penalty to the consumer, or in the reporting of negative information to a consumer reporting agency. Because consumers are often afforded a grace period before a late fee accrues, the Board has revised the comment to reference grace periods. The final comment thus states that a servicer that receives a payment on or before the due date (or within any grace period), and does not enter the payment on its books or in its system until after the payment's due date (or expiration of any grace period) does not violate the rule as long as the entry does not result in the imposition of a late charge, additional interest, or similar penalty to the consumer, or in the reporting of negative information to a consumer reporting agency. If a payment is received after the due date and any grace period, § 226.36(c)(1)(i) does not prohibit the assessment of late charges or reporting negative information to a consumer reporting agency.

Some industry commenters were concerned that the rule would affect their monthly interest accrual accounting systems. Many closed-end mortgage loan agreements require calculation of interest based on an amortization schedule where payments are deemed credited as of the due date, whether the payment was actually received prior to the scheduled due date or within any grace period. Thus, making the scheduled payment early does not decrease the amount of interest the consumer owes, nor does making the scheduled payment after the due date (but within a grace period) increase the interest the consumer owes. According to these commenters, this so-called ''monthly interest accrual amortization method'' provides certainty to consumers (about payments due) and to investors (about expected yields). The final rule is not intended to prohibit or alter use of this method, so long as the servicer recognizes on its books or in its system that payments have been timely made for purposes of determining late fees or triggering negative credit reporting.

The final rule also adopts proposed comment 36(d)(2)–1, redesignated as 36(c)(2)–1, which states that the servicer may specify in writing reasonable requirements for making payments. One commenter expressed concern that late fees or negative credit reports may be triggered when a timely payment requires extensive research, and the creditor may inadvertently violate § 226.36(c)(1)(i). Such research might be required, for example, when a check does not include the account number for the mortgage loan and is written by someone other than the consumer. However, in this scenario, the check would typically constitute a payment that does not conform to the servicer's reasonable payment requirements. If a payment is non-conforming, and the servicer nonetheless accepts the payment, then § 226.36(c)(2) provides that the servicer must credit the account within five days of receipt. If the servicer chooses not to accept the non-conforming payment, it would not violate the rule by returning the check.

Comment 36(c)(2)–1 provides examples of reasonable payment requirements. Although the list of examples is non-exclusive, at the request of several commenters, payment coupons have been added to the list of examples because they can assist servicers in expediting the crediting process to consumers' benefit.

The Board sought comment on whether it should provide a safe harbor as to what constitutes a reasonable payment requirement, for example, a cut-off time of 5 p.m. for receipt of a mailed check. Commenters generally supported including safe harbors; accordingly, new comment 32(c)(2)–2 provides that it would be reasonable to require a cut-off time of 5 p.m. for receipt of a mailed check at the location specified by the creditor for receipt of such check.

Partial payments. The Board sought comment on whether (and if so, how) partial payments should be addressed in the prompt crediting rule. Consumer advocate and industry commenters disagreed on whether partial payments should be credited, if the consumer's payment covers at least the principal and interest due but not amounts due for escrows or late or other service fees. Consumer groups argued that servicers should be required to credit partial payments under the rule, when the payment would cover at least the principal and interest due. They expressed concern that servicers routinely place such partial payments into suspense accounts, triggering the accrual of late fees and other default fees. On the other hand, most industry commenters urged the Board not to require crediting of partial payments, because doing so would contradict the structure of uniform loan documents, would violate servicing agreements, would be contrary to monthly interest accrual accounting methods, and would require extensive systems and accounting changes. They also argued that crediting partial payments could cause the consumer's loan balance to increase. After crediting the partial payment, the servicer would add the remaining payment owed to the principal balance; thus, the principal balance would be greater than the amount scheduled (and the interest calculated on that larger principal balance that would be due would be greater than the scheduled interest). As a result, subsequent regularly scheduled payments would no longer cover the actual outstanding principal and interest due.

New comment 36(c)(1)(i)–2 makes clear that whether a partial payment must be credited depends on the contract between the parties. Specifically, the new comment states that payments should be credited based on the legal obligation between the creditor and consumer. The comment also states that the legal obligation is determined by applicable state law or other law. Thus, if under the terms of the legal obligations governing the loan, the required monthly payment includes principal, interest, and escrow, then consistent with those terms, servicers would not be required to credit payments that include only principal and interest payments. Concerns about partial payments may be addressed in part by the fee pyramiding rule, discussed below, which prohibits servicers from charging late fees if a payment due is short solely by the amount of a previously assessed late fee.

Pyramiding Late Fees

The Board proposed to adopt a parallel approach to the existing prohibition on late fee pyramiding contained in the ''credit practices rule,'' under section 5 of the FTC Act, 15 U.S.C. 45. *See, e.g.*, 12 CFR 227.15 (Board's Regulation AA). Proposed § 226.36(c)(1)(ii) would have prohibited servicers from imposing any late fee or delinquency charge on the consumer in connection with a payment, when the consumer's payment was timely and made in full but for any previously assessed late fees. The proposed commentary provided that the prohibition should be construed consistently with the credit practices rule. The final rule adopts the proposal and accompanying staff commentary.

Commenters generally supported prohibiting fee pyramiding. Several commenters argued, however, that a new rule would be unnecessary because servicers are subject to a regulation prohibiting fee pyramiding, whether they are banks (12 CFR 227.15), thrifts (12 CFR 535.4), credit unions (12 CFR 706.4) or other institutions (16 CFR 444.4). However, the Board believes that adopting a fee pyramiding prohibition under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), would extend greater protections to consumers than currently provided by regulation. While fee pyramiding is impermissible for all entities under either the Board, OTS, or FTC rules, state officials are not granted authority under the FTC Act to bring enforcement actions against institutions. By bringing the fee pyramiding rule under TILA Section 129(l)(2), state attorneys general would be able to enforce the rule through TILA, where currently they may be limited to enforcing the rule solely through state statutes (which statutes may not be uniform). Accordingly, the anti-pyramiding rule adopted today would provide state attorneys general an additional means of enforcement against servicers, thus providing an additional consumer protection against an unfair practice.

Schedule of Fees and Charges

Proposed 226.36(d)(1)(iii) would have required a servicer to provide to a consumer upon request a schedule of all specific fees and charges that may be imposed in connection with the servicing of the consumer's account, including a dollar amount and an explanation of each and the circumstances under which each fee may be imposed. The proposal would have required a fee schedule that is specific both as to the amount and type of each charge, to prevent servicers from disguising fees by lumping them together or giving them generic names. The proposal also would have required the disclosure of third party fees assessed on consumers by servicers. The rule was intended to bring transparency to the market, to enhance consumer understanding of servicer charges, and to make it more difficult for unscrupulous servicers to camouflage or inflate fees. The Board sought comment on the effectiveness of this approach, and solicited suggestions on alternative methods to achieve the same objective. Given servicers' potential difficulty in identifying the specific amount of third party charges prior to imposition of such charges, the Board also sought comment on whether the benefit of increasing the transparency of third party fees would outweigh the costs associated with a servicer's uncertainty as to such fees.

Most commenters opposed the fee schedule proposal. One consumer advocate group argued that the disclosure would not help because consumers cannot shop for and select servicers. Other consumer advocates urged the Board to adopt alternative measures they argued would be more effective to prevent servicer abuses. Industry commenters also objected to the proposal as impracticable and unnecessarily burdensome. Some stated that they currently provide limited fee schedules upon request, but that they would incur a substantial time and cost burden to reprint schedules or add addenda when fees change. Many industry commenters strongly opposed disclosure of third party fees. These commenters argued that fees can vary greatly by geography (inter- and intra-state) and over the life of the loan, and are not within the servicer's control, particularly when the consumer is in default. Moreover, they stated, some charges relating to foreclosure or other legal actions cannot be determined in advance. For example, newspaper publication costs will vary depending on the newspaper and length of the notice required; third party service providers may charge varying prices based on the cost of labor, materials, and scope of work required.[120] Industry commenters maintained that servicers would pass on to consumers the costs of the increased burden and risk incurred. At a minimum, they argued, the fee schedule should be limited to standard or common fees, such as nonsufficient fund fees or duplicate statement fees.

The Board has considered the concerns raised by commenters and has concluded that the transparency benefit of the schedule does not sufficiently offset the burdens of producing such a schedule. Thus, the Board is not adopting proposed § 226.36(d)(1)(iii). First, the transparency benefit is limited. It is not clear that consumers would request fee schedules sufficiently in advance of being charged any fees so as to provide consumers the benefit of the notice intended by the proposed rule. In addition, any schedules provided to consumers may be out of date by the time the consumer is assessed fees. Many third party fees would also be impractical to specify. Even if third party fees are simply listed as ''actual charge'' or ''market price,'' the fee schedules may be too long—possibly dozens of pages— and detailed to be meaningful or useful to consumers. The Board considered limiting fee schedules to the servicer's own standard fees. However, while such schedules might assist consumers who are current, they would be of limited utility to delinquent consumers, who are often subject to substantial third party fees. For the foregoing reasons, the Board is not adopting proposed § 226.36(d)(1)(iii).

The Board solicited suggestions on alternative methods to address servicer charges and fees. Commenters urged the Board to consider a variety of alternatives to combat abusive servicing

[120] *See, e.g.*, Vikas Bajaj, *Contractors Are Kept Busy Maintaining Abandoned Homes,* N.Y. Times (May 26, 2008), available at *http://www.nytimes.com/2008/05/27/business/27home.html?_r=1&scp=1&sq=florida+foreclosure&st=nyt&oref=slogin.*

practices, including prohibiting servicers from imposing fees unless the fee is authorized by law, agreed to in the note, and bona fide and reasonable; prohibiting servicers from misstating the amounts consumers owe; and requiring servicers to provide monthly statements to consumers to permit consumers to monitor charges. The Board continues to have concerns about transparency and abuse of servicer fees. The Board will continue to evaluate the issue, and may consider whether to propose additional rules in this area in connection with its comprehensive review of Regulation Z's closed-end mortgage disclosure rules.

Loan Payoff Statements

Proposed § 226.36(d)(1)(iv) would have prohibited a servicer from failing to provide, within a reasonable time after receiving a request from the consumer or any person acting on behalf of the consumer, an accurate statement of the full amount required to pay the obligation in full as of a specified date, often referred to as a payoff statement. The proposed commentary stated that under normal market conditions, three business days would be a reasonable time to provide the payoff statements; however, a longer time might be reasonable when the market is experiencing an unusually high volume of refinancing requests.

Consumer advocates strongly supported the proposed rule, and most community banks stated that three business days would be adequate for production of payoff statements. However, large financial institutions and their trade associations urged the Board to adopt a longer time period in the commentary than three business days. Large financial institutions and their trade associations also requested clarification on requests from third parties, citing privacy concerns. Further, they urged the Board to refine the rule to provide that statements should be accurate when issued, because events could occur after issuance that would make the payoff statement inaccurate.

The Board is adopting the rule substantially as proposed, renumbered as § 226.36(c)(1)(iii), with clarifications and changes to the commentary. The Board has revised the accompanying staff commentary to provide that five business days would normally be a reasonable time to provide the statements under most circumstances, and to make several other clarifications in response to commenters' concerns.

Servicers' delays in providing payoff statements can impede consumers from refinancing existing loans or otherwise clearing title and increase transaction costs. Promptly delivered payoff statements also help consumers to monitor inflated payoff claims. Thus, the Board is adopting a rule requiring servicers to provide an accurate payoff statement within a reasonable time after receiving a request.

As noted above, the proposed commentary stated that under normal market conditions, three business days would be a reasonable time to provide the payoff statements. Large financial institutions and their trade associations encouraged the Board to extend the three business day time frame to anywhere from five business days to fifteen calendar days to provide servicers enough time to compile the necessary payoff information. While the Board notes that the commentary's time frame is a safe harbor and not a requirement, the Board is extending the time frame from three to five business days to address commenters' concerns.

Several industry commenters also requested special time periods for homes in foreclosure or loss mitigation. Some argued that emergency circumstances (such as imminent foreclosure) require swifter servicer action; on the contrary, others argued that such circumstances are inherently complicated and require additional servicer time and effort. However, the Board believes five business days should provide sufficient time to handle most payoff requests, including most requests where the loan is delinquent, in bankruptcy, or the servicer has incurred an escrow advance. As discussed below, there may be circumstances under which a longer time period is reasonable; the response time would simply not fall under the five business day safe harbor.

The commentary retains the proposal that the time frame might be longer in some instances. The example has been revised, however, from when ''the market'' is experiencing an unusually high volume of refinancing requests to ''the servicer.'' A particular servicer's experience may not correspond perfectly with general market conditions. The example is intended to recognize that more time may be reasonable where a servicer is experiencing temporary constraints on its ability to respond to payoff requests. The example is not intended, however, to enable servicers to take an unreasonable amount of time to provide payoff statements if it is due to a failure to devote adequate staffing to handling requests. The Board believes that the revised commentary balances servicers' operational needs with consumers' interests in promptly obtaining a payoff statement.

Under the proposed rule, the servicer would be required to respond to the request of a person acting on behalf of the consumer. Thus, for example, a creditor with which a consumer is refinancing may request a payoff statement. Others who act on the consumer's behalf, such as a non-profit homeownership counselor, also may wish to obtain a payoff statement for the consumer. Some industry commenters expressed concern about the privacy implications of such a requirement, and requested that the Board permit additional time to confirm the consumer's permission prior to releasing account information. To address these concerns, the Board has revised the commentary to state that the servicer may first take reasonable measures to verify the identity of persons purporting to act on behalf of the consumer and to obtain the consumer's authorization to release information to any such persons before the ''reasonable time'' frame begins to run.

Industry commenters also requested that, as in the prompt crediting rule, servicers be permitted to specify reasonable requirements to ensure payoff requests may be promptly processed. The Board believes clear procedures for consumer requests for loan payoff statements will benefit consumers, as these procedures will expedite processing of a consumer's request. Therefore, the Board is adding new commentary 226.36(c)(1)(iii)–3 to clarify that the servicer may specify reasonable requirements for making payoff requests, such as requiring requests to be in writing and directed to a specific address, e-mail address or fax number specified by the servicer, or orally to a specified telephone number, or any other reasonable requirement or method. If the consumer does not follow these requirements, a longer time frame for responding to the request would be reasonable.

Finally, industry commenters requested clarification that the statement must be accurate when issued. They maintained that events occurring after issuance of the statement cause a statement to become inaccurate, such as when a consumer's previous payment is returned for insufficient funds after the servicer has issued the loan payoff statement. The Board is adding new comment 226.36(c)(1)(iii)–4 to explain that payoff statements must be accurate when issued. The payoff statement amount should reflect all payments due and all fees and charges incurred as of the date of issuance. However, the Board recognizes that events occurring after issuance and outside the servicer's control, such as a returned check and nonsufficient funds fee, or an escrow advance, may cause the payoff statement to become inaccurate. If the statement was accurate when it was issued, subsequent events that change the payoff amount do not result in a violation of the rule.

D. Coverage—§ 226.36(d)

The Board proposed to exclude HELOCs from § 226.36(d) because most originators of HELOCs hold them in portfolio rather than sell them, which aligns these originators' interests in loan performance more closely with their borrowers' interests, and HELOC originations are concentrated in the banking and thrift industries, where the federal banking agencies can use supervisory authorities to protect borrowers. As described in more detail in part IX.E above, the proposed exclusion of HELOCs drew criticism from several consumer and civil rights groups but strong support from industry commenters. For the reasons discussed in part VIII.H above, the Board is adopting the exclusion as proposed, renumbered as § 226.36(d).

XI. Advertising

The Board proposed to amend the advertising rules for open-end home-equity plans under § 226.16, and for closed-end credit under § 226.24, to address advertisements for home-secured loans. For open-end home-equity plan advertisements, the two most significant proposed changes related to the clear and conspicuous standard and the advertisement of promotional terms. For advertisements for closed-end credit secured by a dwelling, the three most significant proposed changes related to strengthening the clear and conspicuous standard for advertising disclosures, regulating the disclosure of rates and payments in advertisements to ensure that low promotional or ''teaser'' rates or payments are not given undue emphasis, and prohibiting certain acts or practices in advertisements as provided under Section 129(l)(2) of TILA.

The final rule is substantially similar to the proposed rule and adopts, with some modifications, each of the proposed changes discussed above. The most significant changes are: Modifying when an advertisement is required to disclose certain information about tax implications; using the term ''promotional'' rather than ''introductory'' to describe certain open-end credit rates or payments applicable for a period less than the term of the loan and removing the requirement that advertisements with promotional rates or payments state the word ''introductory;'' excluding radio and television advertisements for home-equity plans from the requirements regarding promotional rates or payments; allowing advertisements for closed-end credit to state that payments do not include mortgage insurance premiums rather than requiring advertisements to state the highest and lowest payment amounts; and removing the prohibition on the use of the term ''financial advisor'' by a for-profit mortgage broker or mortgage lender.

Public Comment

Most commenters were generally supportive of the Board's proposed advertising rules. Lenders and their trade associations made a number of requests for clarification or modification of the rules, and a few cautioned that requiring too much information be disclosed in advertisements could cause creditors to avoid advertising specific credit terms, thereby depriving consumers of useful information. By contrast, consumer and community groups as well as state and local government officials made some suggestions for tightening the application of the rules. The comments are discussed in more detail throughout this section as applicable.

A. Advertising Rules for Open-End Home-Equity Plans—§ 226.16

Overview

The Board is revising the open-end home-equity plan advertising rules in § 226.16. As in the proposal, the two most significant changes relate to the clear and conspicuous standard and the advertisement of promotional terms in home-equity plans. Each of these proposed changes is summarized below.

First, as proposed, the Board is revising the clear and conspicuous standard for home-equity plan advertisements, consistent with the approach taken in the advertising rules for consumer leases under Regulation M. *See* 12 CFR 213.7(b). New commentary provisions clarify how the clear and conspicuous standard applies to advertisements of home-equity plans with promotional rates or payments, and to Internet, television, and oral advertisements of home-equity plans. The rule also allows alternative disclosures for television and radio advertisements for home-equity plans by revising the Board's earlier proposal for open-end plans that are not home-secured to apply to home-equity plans as well. *See* 12 CFR 226.16(e) and 72 FR 32948, 33064 (June 14, 2007).

Second, the Board is amending the regulation and commentary to ensure that advertisements adequately disclose not only promotional plan terms, but also the rates and payments that will apply over the term of the plan. The changes are modeled after proposed amendments to the advertising rules for open-end plans that are not home-secured. *See* 73 FR 28866, 28892 (May 19, 2008) and 72 FR 32948, 33064 (June 14, 2007).

The Board is also implementing provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 which requires disclosure of the tax implications of certain home-equity plans. *See* Public Law 109–8, 119 Stat. 23. Other technical and conforming changes are also being made.

The Board proposed to prohibit certain acts or practices connected with advertisements for closed-end mortgage credit under TILA section 129(l)(2) and sought comment on whether it should extend any or all of the prohibitions contained in proposed § 226.24(i) to home-equity plans, or whether there were other acts or practices associated with advertisements for home-equity plans that should be prohibited. The final rule does not apply the prohibitions contained in § 226.24(i) to home-equity plans for the reasons discussed below in connection with the final rule for closed-end mortgage credit advertisements. *See* discussion of § 226.24(i) below.

Current Statute and Regulation

TILA Section 147, implemented by the Board in § 226.16(d), governs advertisements of open-end home-equity plans secured by the consumer's principal dwelling. 15 U.S.C. 1665b. The statute applies to the advertisement itself, and therefore, the statutory and regulatory requirements apply to any person advertising an open-end credit plan, whether or not they meet the definition of creditor. *See* comment 2(a)(2)–2. Under the statute, if an open-end credit advertisement sets forth, affirmatively or negatively, any of the specific terms of the plan, including any required periodic payment amount, then the advertisement must also clearly and conspicuously state: (1) Any loan fee the amount of which is determined as a percentage of the credit limit and an estimate of the aggregate amount of other fees for opening the account; (2) in any case in which periodic rates may be used to compute the finance charge, the periodic rates expressed as an annual percentage rate; (3) the highest annual percentage rate which may be imposed under the plan; and (4) any other information the Board may by regulation require.

The specific terms of an open-end plan that ''trigger'' additional disclosures, which are commonly known as ''triggering terms,'' are the payment terms of the plan, or finance charges and other charges required to be disclosed under §§ 226.6(a) and 226.6(b). If an advertisement for a home-equity plan states a triggering term, the regulation requires that the advertisement also state the terms required by the statute. *See* 12 CFR 226.16(d)(1); *see also* comments 16(d)–1 and –2.

Authority

The Board is exercising the following authorities in promulgating final rules. TILA Section 105(a) authorizes the Board to adopt regulations to ensure meaningful disclosure of credit terms so that consumers will be able to compare available credit terms and avoid the uninformed use of credit. 15 U.S.C. 1604(a). TILA Section 122 authorizes the Board to require that information, including the information required under Section 147, be disclosed in a clear and conspicuous manner. 15 U.S.C. 1632. TILA Section 147 also requires that information, including any other information required by regulation by the Board, be clearly and conspicuously set forth in such form and manner as the Board may by regulation require. 15 U.S.C. 1665b.

Discussion

Clear and conspicuous standard. The Board is adopting as proposed new comments 16–2 to –5 to clarify how the clear and conspicuous standard applies to advertisements for home-equity plans.

Comment 16–1 explains that advertisements for open-end credit are subject to a clear and conspicuous standard set forth in § 226.5(a)(1). The Board is not prescribing specific rules regarding the format of advertisements. However, new comment 16–2 elaborates on the requirement that certain disclosures about promotional rates or payments in advertisements for home-equity plans be prominent and in close proximity to the triggering terms in order to satisfy the clear and conspicuous standard when promotional rates or payments are advertised and the disclosure requirements of new § 226.16(d)(6) apply. The disclosures are deemed to meet this requirement if they appear immediately next to or directly above or below the trigger terms, without any intervening text or graphical displays. Terms required to be disclosed with equal prominence to the promotional rate or payment are deemed to meet this requirement if they appear in the same type size as the trigger terms. A more detailed discussion of the requirements for promotional rates or payments is found below.

The equal prominence and close proximity requirements of § 226.16(d)(6) apply to all visual text advertisements except for television advertisments. However, comment 16–2 states that electronic advertisements that disclose promotional rates or payments in a manner that complies with the Board's recently amended rule for electronic advertisements under § 226.16(c) are deemed to satisfy the clear and conspicuous standard. *See* 72 FR 63462 (Nov. 9, 2007). Under the rule, if an electronic advertisement provides the required disclosures in a table or schedule, any statement of triggering terms elsewhere in the advertisement must clearly direct the consumer to the location of the table or schedule. For example, a triggering term in an advertisement on an Internet Web site may be accompanied by a link that directly takes the consumer to the additional information. *See* comment 16(c)(1)–2.

The Board sought comment on whether it should amend the rules for electronic advertisements for home-equity plans to require that all information about rates or payments that apply for the term of the plan be stated in close proximity to promotional rates or payments in a manner that does not require the consumer to click a link to access the information. The majority of commenters who addressed this issue urged the Board to adopt comment 16–2 as proposed. They noted that many electronic advertisements on the Internet are displayed in small areas, such as in banner advertisements or next to search engine results, and requiring information about the rates or payments that apply for the term of the plan to be in close proximity to the promotional rates or payments would not be practical. These commenters also suggested that Internet users are accustomed to clicking on links in order to find further information. Commenters also expressed concern about the practicality of requiring closely proximate disclosures in electronic advertisements that may be displayed on devices with small screens, such as on Internet-enabled cellular phones or personal digital assistants, that might necessitate scrolling or clicking on links in order to view additional information.

The Board is adopting comment 16–2 as proposed. The Board agrees that requiring disclosures of information about rates or payments that apply for the term of the plan to be in close proximity to promotional rates or payments would not be practical for many electronic advertisements and that the requirements of § 226.16(c) adequately ensure that consumers viewing electronic advertisements have access to important additional information about the terms of the advertised product.

The Board is also adopting as proposed new comments to interpret the clear and conspicuous standards for Internet, television, and oral advertisements of home-equity plans. New comment 16–3 explains that disclosures in the context of visual text advertisements on the Internet must not be obscured by techniques such as graphical displays, shading, coloration, or other devices, and must comply with all other requirements for clear and conspicuous disclosures under § 226.16(d). New comment 16–4 likewise explains that textual disclosures in television advertisements must not be obscured by techniques such as graphical displays, shading, coloration, or other devices, must be displayed in a manner that allows the consumer to read the information, and must comply with all other requirements for clear and conspicuous disclosures under § 226.16(d). The Board believes, however, that this rule can be applied with some flexibility to account for variations in the size of television screens. For example, a lender would not violate the clear and conspicuous standard if the print size used was not legible on a handheld or portable television. New comment 16–5 explains that oral advertisements, such as by radio or television, must provide disclosures at a speed and volume sufficient for a consumer to hear and comprehend them. In this context, the word ''comprehend'' means that the disclosures must be intelligible to consumers, not that advertisers must ensure that consumers understand the meaning of the disclosures. The Board is also allowing the use of a toll-free telephone number as an alternative to certain disclosures in radio and television advertisements.

Section 226.16(d)(2)—Discounted and Premium Rates

If an advertisement for a variable-rate home-equity plan states an initial annual percentage rate that is not based on the index and margin used to make later rate adjustments, the advertisement must also state the period of time the initial rate will be in effect, and a reasonably current annual percentage rate that would have been in effect using the index and margin. *See* 12 CFR 226.16(d)(2). The Board is adopting as proposed revisions to this section to require that the triggered disclosures be stated with equal prominence and in close proximity to the statement of the initial APR. The Board believes that this will enhance consumers' understanding of the cost of credit for the home-equity plan being advertised.

As proposed, new comment 16(d)–6 provides safe harbors for what constitutes a ''reasonably current index and margin'' as used in § 226.16(d)(2) as well as § 226.16(d)(6). Under the comment, the time period during which an index and margin are considered reasonably current depends on the medium in which the advertisement was distributed. For direct mail advertisements, a reasonably current index and margin is one that was in effect within 60 days before mailing. For printed advertisements made available to the general public and for advertisements in electronic form, a reasonably current index and margin is one that was in effect within 30 days before printing, or before the advertisement was sent to a consumer's e-mail address, or for advertisements made on an Internet Web site, when viewed by the public.

Section 226.16(d)(3)–Balloon Payment

Existing § 226.16(d)(3) requires that if an advertisement for a home-equity plan contains a statement about any minimum periodic payment, the advertisement must also state, if applicable, that a balloon payment may result. As proposed, the Board is revising this section to clarify that only statements of the amount of any minimum periodic payment trigger the required disclosure, and to require that the disclosure of a balloon payment be equally prominent and in close proximity to the statement of a minimum periodic payment. Consistent with comment 5b(d)(5)(ii)–3, the Board is clarifying that the disclosure is triggered when an advertisement contains a statement of any minimum periodic payment amount and a balloon payment may result if only minimum periodic payments are made, even if a balloon payment is uncertain or unlikely. Additionally, the Board is clarifying that a balloon payment results if paying the minimum periodic payments would not fully amortize the outstanding balance by a specified date or time, and the consumer must repay the entire outstanding balance at such time.

The final rule, as proposed, incorporates the language from existing comment 16(d)–7 into the text of § 226.16(d)(3) with technical revisions. The comment is revised and renumbered as comment 16(d)–9. The required disclosures regarding balloon payments must be stated with equal prominence and in close proximity to the minimum periodic payment. The Board believes that this will enhance consumers' ability to notice and understand the potential financial impact of making only minimum payments.

Section 226.16(d)(4)—Tax Implications

Section 1302 of the Bankruptcy Act amends TILA Section 147(b) to require additional disclosures for advertisements that are disseminated in paper form to the public or through the Internet, relating to an extension of credit secured by a consumer's principal dwelling that may exceed the fair market value of the dwelling. Such advertisements must include a statement that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not deductible for Federal income tax purposes. 15 U.S.C. 1665b(b). The statute also requires a statement that the consumer should consult a tax adviser for further information on the tax deductibility of the interest.

The Bankruptcy Act also requires that disclosures be provided at the time of application in cases where the extension of credit may exceed the fair market value of the dwelling. *See* 15 U.S.C. 1637a(a)(13). The Board intends to implement the application disclosure portion of the Bankruptcy Act during its forthcoming review of closed-end and HELOC disclosures under TILA. However, the Board requested comment on the implementation of both the advertising and application disclosures under this provision of the Bankruptcy Act for open-end credit in its October 17, 2005, ANPR. 70 FR 60235, 60244 (Oct. 17, 2005). A majority of comments on this issue addressed only the application disclosure requirement, but some commenters specifically addressed the advertising disclosure requirement. One industry commenter suggested that the advertising disclosure requirement apply only in cases where the advertised product allows for the credit to exceed the fair market value of the dwelling. Other industry commenters suggested that the requirement apply only to advertisements for products that are intended to exceed the fair market value of the dwelling.

The Board proposed to revise § 226.16(d)(4) and comment 16(d)–3 to implement TILA Section 147(b). The Board's proposal applied the new requirements to advertisements for home-equity plans where the advertised extension of credit may, by its terms, exceed the fair market value of the dwelling. The Board sought comment on whether the new requirements should instead apply to only advertisements that state or imply that the creditor provides extensions of credit greater than the fair market value of the dwelling. Of the few commenters who addressed this issue, the majority were in favor of the alternative approach because many home-equity plans may, in some circumstances, allow for extensions of credit greater than the fair market value of the dwelling and advertisers would likely include the disclosure in nearly all advertisements.

The final rule differs from the proposed rule and requires that the additional tax implication disclosures be given only when an advertisement states that extensions of credit greater than the fair market value of the dwelling are available. The rule does not apply to advertisements that merely imply that extensions of credit greater than the fair market value of the dwelling may occur. By limiting the required disclosures to only those advertisements that state that extensions of credit greater than the fair market value of the dwelling are available, the Board believes the rule will provide the required disclosures to consumers when they are most likely to be receptive to the information while avoiding overloading consumers with information about the tax consequences of home-equity plans when it is less likely to be meaningful to them.

Comment 16(d)–3 is revised to conform to the final rule and to clarify when an advertisement must give the disclosures required by § 226.16(d)–4 for all home-equity plan advertisements that refer to tax deductibility and when an advertisement must give the new disclosures relating to extensions of credit greater than the fair market value of the consumer's dwelling.

Section 226.16(d)(6)—Promotional Rates and Payments

The Board proposed to add § 226.16(d)(6) to address the advertisement of promotional (termed ''introductory'' in the proposal) rates and payments in advertisements for home-equity plans. The proposed rule provided that if an advertisement for a home-equity plan stated a promotional rate or payment, the advertisement must use the term ''introductory'' or ''intro'' in immediate proximity to each mention of the promotional rate or payment. The proposed rule also provided that such advertisements must disclose the following information in a clear and conspicuous manner with each listing of the promotional rate or payment: The period of time during which the promotional rate or promotional payment will apply; in the case of a promotional rate, any annual percentage rate that will apply under the plan; and, in the case of a promotional payment, the amount and time periods of any payments that will apply under the plan. In variable-rate transactions, payments determined based on application of an index and margin to an assumed balance would be required to be disclosed based on a reasonably current index and margin.

The final rule excludes radio and television advertisements for home-equity plans from the requirements of § 226.16(d)(6). This modification is consistent with the approach the Board proposed, and is adopting, for § 226.24(f) which contains similar requirements for advertisements for closed-end credit that is home-secured. *See* § 226.24(f)(1). As the Board noted in the supplementary information to the proposal for advertisements for home-secured closed-end loans, the Board does not believe it is feasible to apply the requirements of this section, notably the close proximity and prominence requirements, to oral advertisements. The Board also sought comment in connection with closed-end home-secured loans on whether these or different standards should be applied to oral advertisements for home-secured loans but commenters did not address this issue.

The final rule also differs from the proposed rule in using the term ''promotional'' rather than ''introductory'' to describe the rates and payments covered by § 226.16(d)(6). The final rule also does not adopt proposed § 226.16(d)(6)(ii) and proposed comment 16(d)–5.ii which required that advertisements with promotional rates or payments state the term ''introductory'' or ''intro'' in immediate proximity to each listing of a promotional rate or payment. Some industry commenters noted that consumers might be confused by the use of the term ''introductory'' in cases where it applied to a promotional rate or payment that was not the initial rate or payment.

The Board received similar comments in response to its earlier proposal for open-end plans that are not home-secured, and the Board subsequently issued a new proposal for those plans that would use the term ''promotional'' rather than ''introductory'' and require that advertisements state the word ''introductory'' only for promotional rates offered in connection with an account opening. 73 FR 28866, 28892 (May 9, 2008). The Board is adopting the term ''promotional'' rather than ''introductory'' in the rule, but the Board is not requiring open-end home-equity plans to state the word ''introductory'' for promotional rates or payments offered in connection with the opening of an account. While the term ''introductory'' is common in other consumer credit contexts, such as credit cards, it may not be as meaningful to consumers in the context of advertisements for home-equity plans and may be confusing to some consumers in that context. The Board believes that the information required to be disclosed under § 226.16(d)(6) is sufficient to inform consumers that advertised promotional terms will not apply for the full term of the plan.

Commenters also expressed confusion about the distinction between promotional rates under § 226.16(d)(6) and discounted and premium rates under § 226.16(d)(2). While some advertised rates may be covered under both § 226.16(d)(2) and § 226.16(d)(6), each rule covers some rates that the other does not. The definition of a promotional rate under § 226.16(d)(6) is not limited to initial rates; a rate that is not based on the index and margin used to make rate adjustments under the plan may be a promotional rate even if it is not the first rate that applies. At the same time, § 226.16(d)(6) applies to a rate that is not based on the index and margin that will be used to make later rate adjustments under the plan only if that rate is less than a reasonably current annual percentage rate that would be in effect under the index and margin used to make rate adjustments. By contrast, § 226.16(d)(2) applies to an initial annual percentage rate that is not based on the index and margin used to make later rate adjustments regardless of whether the later rate would be greater or less than the initial rate.

Section 226.16(d)(6)(i)—Definitions. The Board proposed to define the terms ''introductory rate,'' ''introductory payment,'' and ''introductory period'' in § 226.16(d)(6)(i). The final rule uses the terms ''promotional rate,'' ''promotional payment,'' and ''promotional period'' instead and the definition of ''promotional payment'' is clarified to refer to the minimum payments under a home-equity plan, but the final rule is otherwise as proposed. In a variable-rate plan, the term ''promotional rate'' means any annual percentage rate applicable to a home-equity plan that is not based on the index and margin that will be used to make rate adjustments under the plan, if that rate is less than a reasonably current annual percentage rate that would be in effect based on the index and margin that will be used to make rate adjustments under the plan. The term ''promotional payment'' means, in the case of a variable-rate plan, the amount of any minimum payment applicable to a home-equity plan for a promotional period that is not derived from the index and margin that will be used to determine the amount of any other minimum payments under the plan and, given an assumed balance, is less than any other minimum payment that will be in effect under the plan based on a reasonably current application of the index and margin that will be used to determine the amount of such payments. For a non-variable-rate plan, the term ''promotional payment'' means the amount of any minimum payment applicable to a home-equity plan for a promotional period if that payment is less than the amount of any other payments required under the plan given an assumed balance. The term ''promotional period'' means a period of time, less than the full term of the loan, that the promotional rate or payment may be applicable.

As proposed, comment 16(d)–5.i clarifies how the concepts of promotional rates and promotional payments apply in the context of advertisements for variable-rate plans. Specifically, the comment provides that if the advertised annual percentage rate or the advertised payment is based on the index and margin that will be used to make rate or payment adjustments over the term of the loan, then there is no promotional rate or promotional payment. On the other hand, if the advertised annual percentage rate, or the advertised payment, is not based on the index and margin that will be used to make rate or payment adjustments, and a reasonably current application of the index and margin would result in a higher annual percentage rate or, given an assumed balance, a higher payment, then there is a promotional rate or promotional payment.

The revisions generally assume that a single index and margin will be used to make rate or payment adjustments under the plan. The Board sought comment on whether and to what extent multiple indexes and margins are used in home-equity plans and whether additional or different rules are needed for such products. Commenters stated that multiple indexes and margins generally are not used within the same plan, but requested clarification on how the requirements of § 226.16(d)(6) would apply to advertisements that contain information about rates or payments based on an index and margin available under the plan to certain consumers, such as those with certain credit scores, but where a different margin may be offered to other consumers. The definitions of promotional rate and promotional payment refer to the rates or payments under the advertised plan. If rate adjustments will be based on only one index and margin for each consumer, the fact that the advertised rate or payment may not be available to all borrowers does not make the advertised rate or payment a promotional one. However, an advertisement for open-end credit may state only those terms that actually are or will be arranged or offered by the creditor. *See* 12 CFR 226.16(a).

One banking industry trade group commenter sought an exception from the definition of promotional rate and promotional payment for initial rates that are derived by applying the index and margin used to make rate adjustments under the loan, but calculated in a slightly different manner than will be used to make later rate adjustments. For example, an initial rate may be calculated based on the index in effect as of the closing or lock-in date, rather than another date which will be used to make other rate adjustments under the plan such as the 15th day of the month preceding the anniversary of the closing date. The Board is not adopting an exception from the definition of promotional rate and promotional payment. However, the Board believes that an initial rate in the example described above would still be ''based on'' the index and margin used to make other rate adjustments under the plan and therefore would not be a promotional rate.

Some industry commenters sought an exclusion from the definition of promotional rate and promotional payment for plans that apply different rates or payments to a draw period and to a repayment period. For example, some plans may provide for interest-only payments during a draw period and fully-amortizing payments during a repayment period. Consistent with the requirements for application disclosures under § 226.5b, the Board is not adopting exceptions for plans with draw periods and repayment periods. If an advertisement states a promotional rate or payment offered during a draw period it must provide the required disclosures about the rates or payments that apply for the term of the plan. The Board believes that such information will help consumers understand the full cost of the credit over the term of the plan.

Commenters also sought to exclude advertisements for plans that permit the consumer to repay all or part of the balance during the draw period at a fixed rate, rather than a variable rate, from the promotional rate and payment requirements. These commenters expressed concern that they did not know at the advertising stage whether consumers would choose the fixed-rate conversion option and that disclosing plans that offer the option as though a consumer had chosen it could lead to confusion. Regulation Z already requires fixed-rate conversion options to be disclosed in applications for variable-rate home-equity plans. *See* comment 5b(d)(5)(ii)–2. The Board believes that requiring information about fixed-rate conversion options to be disclosed in advertisements could confuse consumers about a feature that is optional. New comment 16(d)–5.v states that the presence of a fixed-rate conversion option does not, by itself, make a rate (or payment) a promotional one.

Similarly, some industry commenters also sought an exception from the definition of promotional rate and payment for plans with preferred-rate provisions, where the rate will increase upon the occurrence of some event. For example, the consumer may be given a preferred rate for electing to make automated payments but that preferred-rate would end if the consumer later ceases that election. Regulation Z already requires preferred-rate provisions to be disclosed in applications for variable-rate home-equity plans. *See* comment 5b(d)(12)(viii)–1. The Board believes that requiring information about preferred-rate provisions to be disclosed at the advertising stage is less likely to be meaningful to consumers who are usually gathering general rate and payment information about multiple plans and are less likely to focus on disclosures about preferred-rate terms and conditions. New comment 16(d)–5.vi states that the presence of a preferred-rate provision does not, by itself, make a rate (or payment) a promotional one.

Comment 16(d)–5.iv, renumbered but otherwise adopted as proposed, clarifies how the concept of promotional payments applies in the context of advertisements for non-variable-rate plans. Specifically, the comment provides that if the advertised payment is calculated in the same way as other payments under the plan based on an assumed balance, the fact that the minimum payment could increase solely if the consumer made an additional draw does not make the payment a promotional payment. For example, if a minimum payment of $500 results from an assumed $10,000 draw, and the minimum payment would increase to $1,000 if the consumer made an additional $10,000 draw, the payment is not a promotional payment.

Section 226.16(d)(6)(ii)—Stating the promotional period and post-promotional rate or payments. Section 226.16(d)(6)(ii), renumbered and modified to exclude radio and television advertisements, but otherwise adopted as proposed, provides that if an advertisement states a promotional rate or promotional payment, it must also clearly and conspicuously disclose, with equal prominence and in close proximity to the promotional rate or payment, the following, as applicable: The period of time during which the promotional rate or promotional payment will apply; in the case of a promotional rate, any annual percentage rate that will apply under the plan; and, in the case of a promotional payment, the amount and time periods of any payments that will apply under the plan. In variable-rate transactions, payments that will be determined based on application of an index and margin to an assumed balance must be disclosed based on a reasonably current index and margin.

Proposed comment 16(d)–5.iii provided safe harbors for satisfying the closely proximate or equally prominent requirements of proposed § 226.16(d)(6)(iii). Specifically, the required disclosures would be deemed to be closely proximate to the promotional rate or payment if they were in the same paragraph as the promotional rate or payment. Information disclosed in a footnote would not be deemed to be closely proximate to the promotional rate or payment. Some commenters noted that the safe harbor definition of ''closely proximate'' in this comment (that the required disclosures be in the same paragraph as the promotional rate or payment) differed from the definition of ''closely proximate'' in comment 16–2 (that the required disclosures be immediately next to or directly above or below the promotional rate or payment). The Board is modifying final comment 16(d)–5.ii, as renumbered, to match the definition of ''closely proximate'' in comment 16–2. However, the Board is retaining the part of the safe harbor that disallows the use of footnotes. Consumer testing of account-opening and other disclosures undertaken in conjunction with the Board's open-end Regulation Z proposal suggests that placing information in a footnote makes it much less likely that the consumer will notice it. As proposed, the required disclosures will be deemed equally prominent with the promotional rate or payment if they are in the same type size as the promotional rate or payment.

Comment 16(d)–5.iii clarifies that the requirement to disclose the amount and time periods of any payments that will apply under the plan may require the disclosure of several payment amounts, including any balloon payments. The comment provides an example of a home-equity plan with several payment amounts over the repayment period to illustrate the disclosure requirements. The comment has been modified from the proposal, in response to public comment, to add a clarification that the final payment need not be disclosed if it is not greater than two times the amount of any other minimum payments under the plan. Comment 16(d)–6, which is discussed above, provides safe harbor definitions for the phrase ''reasonably current index and margin.''

Section 226.16(d)(6)(iii)—Envelope excluded. Section 226.16(d)(6)(iii), renumbered but otherwise adopted as proposed, provides that the requirements of § 226.16(d)(6)(ii) do not apply to envelopes, or to banner advertisements and pop-up advertisements that are linked to an electronic application or solicitation provided electronically. In the Board's view, because banner advertisements and pop-up advertisements are used to direct consumers to more detailed advertisements, they are similar to envelopes in the direct mail context.

Section 226.16(e)—Alternative Disclosures—Television or Radio Advertisements

The Board is adopting § 226.16(e), as renumbered, to allow for alternative disclosures of the information required for home-equity plans under § 226.16(d)(1), where applicable. The supplementary information to the proposal referred to these as alternative disclosures for oral advertisements, but the proposed regulation text did not limit the alternative disclosures to oral advertisements. The proposed regulation text was consistent with the Board's proposal for credit cards and other open-end plans. *See* proposed § 226.16(f) and 72 FR 32948, 33064 (June 14, 2007). The final rule does not limit the alternative disclosures to oral advertisements. The final rule does, however, limit § 226.16(e)'s application to advertisements for home-equity plans and redesignates it from § 226.16(f) to § 226.16(e). These changes are meant to conform the rule to the existing regulation, but the Board notes that its proposal for open-end plans that are not home-secured, if adopted, would expand the rule to allow for alternative disclosures for all advertisements for open-end credit. In addition, § 226.16(e) permits an advertisement to provide either a toll-free telephone number or a telephone number that allows a consumer to reverse the telephone charges when calling for information. The final rule also adds new commentary clarifying the alternative disclosure option. This commentary was included in the Board's earlier proposal for credit cards and other open-end plans, and is substantively the same as the commentary for alternative disclosures for advertisements for closed-end credit under § 226.24(g). *See* 72 FR 32948, 33144 (June 14, 2007), *and* comments 24(g)–1 and 24(g)–2.

The Board's revision follows the general format of the Board's earlier proposal for alternative disclosures for television and radio advertisements. If a triggering term is stated in the advertisement, one option is to state clearly and conspicuously each of the disclosures required by §§ 226.16(b)(1) and (d)(1). Another option is for the advertisement to state clearly and conspicuously the APR applicable to the home-equity plan, and the fact that the rate may be increased after consummation, and provide a telephone number that the consumer may call to receive more information. Given the space and time constraints on television and radio advertisements, the required disclosures may go unnoticed by consumers or be difficult for them to retain. Thus, providing an alternative means of disclosure may be more effective in many cases given the nature of the media.

This approach is also similar to the approach taken in the advertising rules for consumer leases under Regulation M, which also allows the use of toll-free numbers in television and radio advertisements. *See* 12 CFR 213.7(f)(1)(ii).

B. Advertising Rules for Closed-End Credit—§ 226.24

Overview

The Board proposed to amend the closed-end credit advertising rules in § 226.24 to address advertisements for home-secured loans. The three most significant aspects of the proposal related to strengthening the clear and conspicuous standard for advertising disclosures, regulating the disclosure of rates and payments in advertisements to ensure that low promotional or ''teaser'' rates or payments are not given undue emphasis, and prohibiting certain acts or practices in advertisements as provided under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2).

The final rule is substantially similar to the proposed rule and adopts, with some modifications, each of the proposed changes discussed above. First, the Board is adding a provision setting forth the clear and conspicuous standard for all closed-end advertisements and a number of new commentary provisions applicable to advertisements for home-secured loans. The regulation is being revised to include a clear and conspicuous standard for advertising disclosures, consistent with the approach taken in the advertising rules for Regulation M. *See* 12 CFR 213.7(b). New staff commentary provisions are added to clarify how the clear and conspicuous standard applies to rates or payments in advertisements for home-secured loans, and to Internet, television, and oral advertisements of home-secured loans. The final rule also adds a provision to allow alternative disclosures for television and radio advertisements that is modeled after a proposed revision to the advertising rules for open-end (not home-secured) plans. *See* 72 FR 32948, 33064 (June 14, 2007).

Second, the Board is amending the regulation and commentary to address the advertisement of rates and payments for home-secured loans. The revisions are designed to ensure that advertisements adequately disclose all rates or payments that will apply over the term of the loan and the time periods for which those rates or payments will apply. Many advertisements for home-secured loans emphasize low, promotional ''teaser'' rates or payments that will apply for a limited period of time. Such advertisements often do not give consumers accurate or balanced information about the costs or terms of the products offered.

The revisions also prohibit advertisements from disclosing an interest rate lower than the rate at which interest is accruing. Instead, the only rates that may be included in advertisements for home-secured loans are the APR and one or more simple annual rates of interest. Many advertisements for home-secured loans promote very low rates that do not appear to be the rates at which interest is accruing. The advertisement of interest rates lower than the rate at which interest is accruing is likely confusing for consumers. Taken together, the Board believes that the changes regarding the disclosure of rates and payments in advertisements for home-secured loans will enhance the accuracy of advertising disclosures and benefit consumers.

Third, pursuant to TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), the Board is prohibiting seven specific acts or practices in connection with advertisements for home-secured loans that the Board finds to be unfair, deceptive, associated with abusive lending practices, or otherwise not in the interest of the borrower.

Bankruptcy Act changes. The Board is also making several changes to clarify certain provisions of the closed-end advertising rules, including the scope of certain triggering terms, and to implement provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requiring disclosure of the tax implications of home-secured loans. *See* Public Law 109–8, 119 Stat. 23. Technical and conforming changes to the closed-end advertising rules are also made.

Public Comment

As discussed above, the Board received numerous, mostly positive, comments on the proposed revisions. Specific comments requesting modifications or clarifications to the proposed requirements for advertisements for closed-end home-secured credit are discussed below as applicable.

Current Statute and Regulation

TILA Section 144, implemented by the Board in § 226.24, governs advertisements of credit other than open-end plans. 15 U.S.C. 1664. TILA Section 144 thus applies to advertisements of closed-end credit, including advertisements for closed-end credit secured by a dwelling (also referred to as ''home-secured loans''). The statute applies to the advertisement itself, and therefore, the statutory and regulatory requirements apply to any person advertising closed-end credit, whether or not such person meets the definition of creditor. *See* comment 2(a)(2)–2. Under the statute, if an advertisement states the rate of a finance charge, the advertisement must state the rate of that charge as an APR. In addition, closed-end credit advertisements that contain certain terms must also include additional disclosures. The specific terms of closed-end credit that ''trigger'' additional disclosures, which are commonly known as ''triggering terms,'' are (1) the amount of the downpayment, if any, (2) the amount of any installment payment, (3) the dollar amount of any finance charge, and (4) the number of installments or the period of repayment. If an advertisement for closed-end credit states a triggering term, then the advertisement must also state any downpayment, the terms of repayment, and the rate of the finance charge expressed as an APR. *See* 12 CFR 226.24(c)–(d) (as redesignated from §§ 226.24(b)–(c)) and the staff commentary thereunder.

Authority

The Board is exercising the following authorities in promulgating final rules. TILA Section 105(a) authorizes the Board to adopt regulations to ensure meaningful disclosure of credit terms so that consumers will be able to compare available credit terms and avoid the uninformed use of credit. 15 U.S.C. 1604(a). TILA Section 122 authorizes the Board to require that information, including the information required under Section 144, be disclosed in a clear and conspicuous manner. 15 U.S.C. 1632. TILA Section 129(l)(2) authorizes the Board to prohibit acts or practices in connection with mortgage loans that the Board finds to be unfair or deceptive. TILA Section 129(l)(2) also authorizes the Board to prohibit acts or practices in connection with the refinancing of mortgage loans that the Board finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower. 15 U.S.C. 1639(l)(2).

Section 226.24(b)—Clear and Conspicuous Standard

As proposed, the Board is adding a clear and conspicuous standard in § 226.24(b) that applies to all closed-end advertising. This provision supplements, rather than replaces, the clear and conspicuous standard that applies to all closed-end credit disclosures under Subpart C of Regulation Z and that requires all disclosures to be in a reasonably understandable form. *See* 12 CFR 226.17(a)(1); comment 17(a)(1)–1. The new provision provides a framework for clarifying how the clear and conspicuous standard applies to advertisements that are not in writing or in a form that the consumer may keep, or that emphasize promotional rates or payments.

Existing comment 24–1 explains that advertisements for closed-end credit are subject to a clear and conspicuous standard based on § 226.17(a)(1). The comment is renumbered as comment 24(b)–1 and revised to reference the format requirements for advertisements of rates or payments for home-secured loans. The Board is not prescribing specific rules regarding the format of advertising disclosures generally. However, comment 24(b)–2 elaborates on the requirement that certain disclosures about rates or payments in advertisements for home-secured loans be prominent and in close proximity to other information about rates or payments in the advertisement in order to satisfy the clear and conspicuous standard and the disclosure requirements of § 226.24(f). Terms required to be disclosed in close proximity to other rate or payment information are deemed to meet this requirement if they appear immediately next to or directly above or below the trigger terms, without any intervening text or graphical displays. Terms required to be disclosed with equal prominence to other rate or payment information are deemed to meet this requirement if they appear in the same type size as other rates or payments. The requirements for disclosing rates or payments are discussed in more detail below.

The equal prominence and close proximity requirements of § 226.24(f) apply to all visual text advertisements except for television advertisements. However, comment 24(b)–2 states that electronic advertisements that disclose rates or payments in a manner that complies with the Board's recently amended rule for electronic advertisements under § 226.24(e) are deemed to satisfy the clear and conspicuous standard. *See* 72 FR 63462 (Nov. 9, 2007). Under the existing rule for electronic advertisements, if an electronic advertisement provides the required disclosures in a table or schedule, any statement of triggering terms elsewhere in the advertisement must clearly direct the consumer to the location of the table or schedule. For example, a triggering term in an advertisement on an Internet Web site may be accompanied by a link that takes the consumer directly to the additional information. *See* comment 24(e)–4.

The Board sought comment on whether it should amend the rules for electronic advertisements for home-secured loans to require that information about rates or payments that apply for the term of the loan be stated in close proximity to other rates or payments in a manner that does not require the consumer to click on a link to access the information. The Board also solicited comment on the costs and practical limitations, if any, of imposing this close proximity requirement on electronic advertisements. The majority of commenters who addressed this issue urged the Board to adopt comment 24(b)–2 as proposed. They noted that many electronic advertisements on the Internet are displayed in small areas, such as in banner advertisements or next to search engine results, and requiring information about the rates or payments that apply for the term of the loan in close proximity to all other applicable rates or payments would not be practical. These commenters also suggested that Internet users are accustomed to clicking on links in order to find further information. Commenters also expressed concern about the practicality of requiring closely proximate disclosures in electronic advertisements that may be displayed on devices with small screens, such as on Internet-enabled cellular telephones or personal digital assistants, that might necessitate scrolling or clicking on links in order to view additional information.

The Board is adopting comment 24(b)–2 as proposed. The Board agrees that requiring disclosures of information about rates or payments that apply for the term of the loan to be in close proximity to information about all other rates or payments would not be practical for many electronic advertisements, and that the requirements of § 226.24(e) adequately ensure that consumers viewing electronic advertisements have access to important additional information about the terms of the advertised product.

The Board is also adopting as proposed new comments to interpret the clear and conspicuous standards for Internet, television, and oral advertisements of home-secured loans. Comment 24(b)–3 explains that disclosures in the context of visual text advertisements on the Internet must not be obscured by techniques such as graphical displays, shading, coloration, or other devices, and must comply with all other requirements for clear and conspicuous disclosures under § 226.24. Comment 24(b)–4 likewise explains that visual text advertisements on television must not be obscured by techniques such as graphical displays, shading, coloration, or other devices, must be displayed in a manner that allows a consumer to read the information required to be disclosed, and must comply with all other requirements for clear and conspicuous disclosures under § 226.24. The Board believes, however, that this rule can be applied with some flexibility to account for variations in the size of television screens. For example, a lender would not violate the clear and conspicuous standard if the print size used was not legible on a handheld or portable television. Comment 24(b)–5 explains that oral advertisements, such as by radio or television, must provide the disclosures at a speed and volume sufficient for a consumer to hear and comprehend them. In this context, the word ''comprehend'' means that the disclosures must be intelligible to consumers, not that advertisers must ensure that consumers understand the meaning of the disclosures. Section 226.24(g) provides an alternative method of disclosure for television or radio advertisements when triggering terms are stated and is discussed more fully below.

Section 226.24(c)—Advertisement of Rate of Finance Charge

Disclosure of simple annual rate or periodic rate. If an advertisement states a rate of finance charge, it must state the rate as an APR. *See* 12 CFR 226.24(c) (as redesignated from § 226.24(b)). An advertisement may also state, in conjunction with and not more conspicuously than the APR, a simple annual rate or periodic rate that is applied to an unpaid balance.

As proposed, the Board is renumbering § 226.24(b) as § 226.24(c), and revising it. The revised rule provides that advertisements for home-secured loans shall not state any rate other than an APR, except that a simple annual rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the APR. Advertisement of a periodic rate, other than the simple annual rate of interest, or any other rates, is no longer permitted in connection with home-secured loans.

Also as proposed, comment 24(b)–2 is renumbered as comment 24(c)–2 and revised to clarify that a simple annual rate or periodic rate is the rate at which interest is accruing. A rate lower than the rate at which interest is accruing, such as an effective rate, payment rate, or qualifying rate, is not a simple annual rate or periodic rate. The example in renumbered comment 24(c)–2 also is revised to reference § 226.24(f), which contains requirements regarding the disclosure of rates and payments in advertisements for home-secured loans.

Buydowns. As proposed, comment 24(b)–3, which addresses ''buydowns,'' is renumbered as comment 24(c)–3 and revised. A buydown is where a seller or creditor offers a reduced interest rate and reduced payments to a consumer for a limited period of time. Previously, this comment provided that the seller or creditor, in the case of a buydown, could advertise the reduced simple interest rate, the limited term to which the reduced rate applies, and the simple interest rate applicable to the balance of the term. The advertisement also could show the effect of the buydown agreement on the payment schedule for the buydown period. The Board is revising the comment to explain that additional disclosures are required when an advertisement includes information showing the effect of the buydown agreement on the payment schedule. Such advertisements must provide the disclosures required by § 226.24(d)(2) because showing the effect of the buydown agreement on the payment schedule is a statement about the amount of any payment, and thus is a triggering term. *See* 12 CFR 226.24(d)(1)(iii). In these circumstances, the additional disclosures are necessary for consumers to understand the costs of the loan and the terms of repayment. Consistent with these changes, and as proposed, the examples of statements about buydowns that an advertisement may make without triggering additional disclosures are being removed.

Effective rates. As proposed, the Board is deleting what was previously comment 24(b)–4. The comment had allowed the advertisement of three rates: the APR; the rate at which interest is accruing; and an interest rate lower than the rate at which interest is accruing, which may be referred to as an effective rate, payment rate, or qualifying rate. The staff commentary also contained an example of how to disclose the three rates.

The Board proposed to delete this staff commentary for the reasons stated below. First, the disclosure of three rates is unnecessarily confusing for consumers and the disclosure of an interest rate lower than the rate at which interest is accruing does not provide meaningful information to consumers about the cost of credit. Second, when the effective rates commentary was adopted in 1982, the Board noted that the commentary was designed ''to address the advertisement of special financing involving 'effective rates,' 'payment rates,' or 'qualifying rates.' '' *See* 47 FR 41338, 41342 (Sept. 20, 1982). At that time, when interest rates were quite high, these terms were used in connection with graduated-payment mortgages. Today, however, some advertisers appear to rely on this comment when advertising rates for a variety of home-secured loans, such as negative amortization loans and option ARMs. In these circumstances, the advertisement of rates lower than the rate at which interest is accruing for these products is not helpful to consumers, particularly consumers who may not fully understand how these non-traditional home-secured loans work.

Some industry commenters suggested that the advertisement of rates lower than the rate at which interest is accruing might provide meaningful information to some consumers.

Specifically, some advertisements for negative amortization loans and option ARMs quote a payment amount that is based on an effective rate. Commenters suggested that if the corresponding effective rate itself was not advertised, consumers might be confused about the rate on which the payment was based. For the reasons stated above, the Board believes that consumers are likely to be confused by advertisements that state a rate lower than the rate at which interest is accruing. The Board is addressing the advertisement of payments for home-secured loans in new § 226.24(f), discussed below, to require that advertisements contain information about the payments that apply for the term of the loan.

Discounted variable-rate transactions. As proposed, comment 24(b)–5 is being renumbered as comment 24(c)–4 and revised to explain that an advertisement for a discounted variable-rate transaction which advertises a reduced or discounted simple annual rate must show with equal prominence and in close proximity to that rate, the limited term to which the simple annual rate applies and the annual percentage rate that will apply after the term of the initial rate expires.

The comment is also being revised to explain that additional disclosures are required when an advertisement includes information showing the effect of the discount on the payment schedule. Such advertisements must provide the disclosures required by § 226.24(d)(2). Showing the effect of the discount on the payment schedule is a statement about the number of payments or the period of repayment, and thus is a triggering term. *See* 12 CFR 226.24(d)(1)(ii). In these circumstances, the additional disclosures are necessary for consumers to understand the costs of the loan and the terms of repayment. Consistent with these changes, the examples of statements about discounted variable-rate transactions that an advertisement may make without triggering additional disclosures are being removed.

Section 226.24(d)—Advertisement of Terms That Require Additional Disclosures

Required disclosures. As proposed, the Board is renumbering § 226.24(c) as § 226.24(d) and revising it. The rule clarifies the meaning of the ''terms of repayment'' required to be disclosed. Specifically, the terms of repayment must reflect ''the repayment obligations over the full term of the loan, including any balloon payment,'' not just the repayment terms that will apply for a limited period of time. This revision is consistent with other changes and is designed to ensure that advertisements for closed-end credit, especially home-secured loans, adequately disclose the terms that will apply over the full term of the loan, not just for a limited period of time.

Consistent with these changes, and as proposed, comment 24(c)(2)–2 is renumbered as comment 24(d)(2)–2 and revised. As proposed, commentary regarding advertisement of loans that have a graduated-payment feature is being removed from comment 24(d)(2)–2.

The Board did not propose to make substantive changes to commentary regarding advertisements for home-secured loans where payments may vary because of the inclusion of mortgage insurance premiums. Under the existing commentary, the advertisement could state the number and timing of payments, the amounts of the largest and smallest of those payments, and the fact that other payments will vary between those amounts. Some industry commenters noted, however, that advertisers can only estimate the amounts of mortgage insurance premiums at the advertising stage, and that the requirement to show the largest and smallest of the payments that include mortgage insurance premiums may not be meaningful to consumers because consumers' actual payment amounts may vary from the advertised payment amounts. For this reason, the commentary is being revised to no longer require the advertisement to show the amount of the largest and smallest payments reflecting mortgage insurance premiums. Rather, the advertisement may state the number and timing of payments, the fact that the payments do not include amounts for mortgage insurance premiums, and that the actual payment obligation will be higher.

In advertisements for home-secured loans with one series of low monthly payments followed by another series of higher monthly payments, comment 24(d)(2)–2.iii explains that the advertisement may state the number and time period of each series of payments and the amounts of each of those payments. However, the amount of the series of higher payments must be based on the assumption that the consumer makes the series of lower payments for the maximum allowable period of time. For example, if a consumer has the option of making interest-only payments for two years and an advertisement states the amount of the interest-only payment, the advertisement must state the amount of the series of higher payments based on the assumption that the consumer makes the interest-only payments for the full two years. The Board believes that without these disclosures consumers may not fully understand the cost of the loan or the payment terms that may result once the higher payments take effect.

As proposed, the revisions to renumbered comment 24(d)(2)–2 apply to all closed-end advertisements. The Board believes that the terms of repayment for any closed-end credit product should be disclosed for the full term of the loan, not just for a limited period of time. The Board also does not believe that this change will significantly impact advertising practices for closed-end credit products such as auto loans and installment loans that ordinarily have shorter terms than home-secured loans.

As proposed, new comment 24(d)(2)–3 is added to address the disclosure of balloon payments as part of the repayment terms. The commentary notes that in some transactions, a balloon payment will occur when the consumer only makes the minimum payments specified in an advertisement. A balloon payment results if paying the minimum payments does not fully amortize the outstanding balance by a specified date or time, usually the end of the term of the loan, and the consumer must repay the entire outstanding balance at such time. The commentary explains that if a balloon payment will occur if the consumer only makes the minimum payments specified in an advertisement, the advertisement must state with equal prominence and in close proximity to the minimum payment statement the amount and timing of the balloon payment that will result if the consumer makes only the minimum payments for the maximum period of time that the consumer is permitted to make such minimum payments. The Board believes that disclosure of the balloon payment in advertisements that promote such minimum payments is necessary to inform consumers about the repayment terms that will apply over the full term of the loan.

As proposed, comments 24(c)(2)–3 and –4 are renumbered as comments 24(d)(2)–4 and –5 without substantive change.

Section 226.24(e)—Catalogs or Other Multiple-Page Advertisements; Electronic Advertisements

The Board is renumbering § 226.24(d) as § 226.24(e) and making technical changes to reflect the renumbering of certain sections of the regulation and commentary, as proposed.

Section 226.24(f)—Disclosure of Rates and Payments in Advertisements for Credit Secured by a Dwelling

The Board proposed to add a new subsection (f) to § 226.24 to address the disclosure of rates and payments in advertisements for home-secured loans. The primary purpose of these provisions is to ensure that advertisements do not place undue emphasis on low promotional ''teaser'' rates or payments, but adequately disclose the rates and payments that the will apply over the term of the loan. The final rule is adopted as proposed, but adds a number of new commentary provisions to clarify the rule in response to public comment.

One banking industry trade group commenter sought an exception from §§ 226.24(f)(2) and (f)(3)(i)(A) for variable-rate loans with initial rates that are derived by applying the index and margin used to make rate adjustments under the loan, but calculated in a slightly different manner than will be used to make later rate adjustments. For example, an initial rate may be calculated based on the index in effect as of the closing or lock-in date, rather than another date which will be used to make other rate adjustments under the plan such as the 15th day of the month preceding the anniversary of the closing date. The Board is not adopting an exception from §§ 226.24(f)(2) and (f)(3)(i)(A). However, the Board believes that an initial rate in the example described above would still be ''based on'' the index and margin used to make other rate adjustments under the plan and therefore it would not, by itself, trigger the required disclosures in § 226.24(f)(2). Likewise, an advertisement need not disclose a separate payment amount under § 226.24(f)(3)(i)(A) for payments that are based on the same index and margin, if even calculated differently.

Commenters also sought to exclude advertisements for variable-rate loans that permit the consumer to convert the loan into a fixed rate loan. These commenters expressed concern that creditors do not know at the advertising stage whether consumers would choose the fixed-rate conversion option and that disclosing loans that offer the option as though a consumer had chosen it could lead to confusion. Regulation Z already requires fixed-rate conversion options be disclosed before consummation. *See* comment 19(b)(2)(vii)–3. The Board believes that requiring information about fixed-rate conversion options be disclosed in advertisements could confuse consumers about a feature that is optional. New comment 24(f)–1.i states that the creditor need not assume that a fixed-rate conversion option, by itself, means that more than one simple annual rate of interest will apply under § 226.24(f)(2) and the payments that would apply if a consumer opted to convert the loan to a fixed rate need not be disclosed as separate payments under § 226.24(f)(3)(i)(A).

Similarly, some industry commenters also sought an exception for loans with preferred-rate provisions, where the rate will increase upon the occurrence of some event. For example, the consumer may be given a preferred rate for electing to make automated payments but that preferred-rate would end if the consumer later ceases that election. Regulation Z already requires preferred-rate provisions be disclosed before consummation. *See* comment 19(b)(2)(vii)–4. The Board believes that requiring information about preferred-rate provisions to be disclosed at the advertising stage is less likely to be meaningful to consumers who are usually gathering general rate and payment information about multiple loans and are less likely to focus on disclosures about preferred-rate terms and conditions. New comment 24(f)–1.ii states that the creditor need not assume a preferred-rate provision, by itself, means that more than one simple annual rate of interest will apply under § 226.24(f)(2) and need not disclose as separate payments under § 226.24(f)(3)(i)(A) the payments that would result upon the occurrence of the event that causes a rate increase under the preferred-rate provision.

Also, comment 24(f)–1.iii excludes loan programs that offer a rate reduction to consumers after the occurrence of a specified event, such as the consumer making a series of on-time payments. Some industry commenters suggested, and the Board agrees, that information about decreases in rates or payments upon the occurrence of a specified event need not be disclosed with equal prominence and in close proximity to information about other rates and payments. The advertisement may disclose only the initial rate or payment and it need not disclose the effect of the rate reduction feature. Alternatively, the advertisement may also disclose the effect of the rate reduction feature, but it would then have to comply with the requirements of § 226.24(f).

Section 226.24(f)(1)—Scope. Section 226.24(f)(1), as proposed, provides that the new section applies to any advertisement for credit secured by a dwelling, other than television or radio advertisements, including promotional materials accompanying applications. The Board does not believe it is feasible to apply the requirements of this section, notably the close proximity and prominence requirements, to oral advertisements. The Board sought comment on whether these or different standards should be applied to oral advertisements for home-secured loans but commenters did not address this issue.

Section 226.24(f)(2)—Disclosure of rates. As proposed, § 226.24(f)(2) addresses the disclosure of rates. Under the rule, if an advertisement for credit secured by a dwelling states a simple annual rate of interest and more than one simple annual rate of interest will apply over the term of the advertised loan, the advertisement must disclose the following information in a clear and conspicuous manner: (a) Each simple annual rate of interest that will apply. In variable-rate transactions, a rate determined by an index and margin must be disclosed based on a reasonably current index and margin; (b) the period of time during which each simple annual rate of interest will apply; and (c) the annual percentage rate for the loan. If the rate is variable, the annual percentage rate must comply with the accuracy standards in §§ 226.17(c) and 226.22.

Comment 24(f)–5, renumbered but otherwise as proposed, specifically addresses how this requirement applies in the context of advertisements for variable-rate transactions. For such transactions, if the simple annual rate that applies at consummation is based on the index and margin that will be used to make subsequent rate adjustments over the term of the loan, then there is only one simple annual rate and the requirements of § 226.24(f)(2) do not apply. If, however, the simple annual rate that applies at consummation is not based on the index and margin that will be used to make subsequent rate adjustments over the term of the loan, then there is more than one simple annual rate and the requirements of § 226.24(f)(2) apply.

The revisions generally assume that a single index and margin will be used to make rate or payment adjustments under the loan. The Board solicited comment on whether and to what extent multiple indexes and margins are used in home-secured loans and whether additional or different rules are needed for such products. Commenters stated that multiple indexes and margins are not used within the same loan, but requested clarification on how the requirements of § 226.24(f) apply to advertisements that contain information about rates or payments based on the index and margin available under the loan to certain consumers, such as those with certain credit scores, but where a different margin may be offered to other consumers. Section 226.24(f) applies to advertisements for variable-rate loans if the simple annual rate of interest (or the payment) that applies at consummation is not based on the index and margin used to make subsequent rate (or payment) adjustments over the term of the loan. *See* comment §§ 226.24(f)–5 and 24(f)(3)–2. If a loan's rate or payment adjustments will be based on only one index and margin for each consumer, the fact that the advertised rate or payment may not be available to all consumers does trigger the requirements of § 226.24(f). However, an advertisement for open-end credit may state only those terms that actually are or will be arranged or offered by the creditor. *See* 12 CFR 226.24(a).

Finally, as proposed, the rule establishes a clear and conspicuous standard for the disclosure of rates in advertisements for home-secured loans. Under this standard, the information required to be disclosed by § 226.24(f)(2) must be disclosed with equal prominence and in close proximity to any advertised rate that triggered the required disclosures, except that the annual percentage rate may be disclosed with greater prominence than the other information.

Proposed comment 24(f)–1 provided safe harbors for compliance with the equal prominence and close proximity standards. Specifically, the required disclosures would be deemed to be closely proximate to the advertised rate or payment if they were in the same paragraph as the advertised rate or payment. Information disclosed in a footnote would not be deemed to be closely proximate to the advertised rate or payment. Some commenters noted that the safe harbor definition of ''closely proximate'' in this comment (that the required disclosures be in the same paragraph as the advertised rate or payment) differed from the definition of ''closely proximate'' in comment 24–2 (that the required disclosures be immediately next to or directly above or below the advertised rate or payment). The Board is renumbering and modifying final comment 24(f)–2 to match the definition of ''closely proximate'' in comment 24–2. However, the Board is retaining the part of the safe harbor that disallows the use of footnotes. Consumer testing of account-opening and other disclosures undertaken in conjunction with the Board's open-end Regulation Z proposal suggests that placing information in a footnote makes it much less likely that the consumer will notice it. As proposed, the required disclosures will be deemed equally prominent with the advertised rate or payment if they are in the same type size as the advertised rate or payment.

Comment 24(f)–3, renumbered but otherwise as proposed, provides a cross-reference to comment 24(b)–2, which provides further guidance on the clear and conspicuous standard in this context.

Section 226.24(f)(3)—Disclosure of payments. New § 226.24(f)(3) addresses the disclosure of payments. As under the proposed rule, if an advertisement for credit secured by a dwelling states the amount of any payment, the advertisement must disclose the following information in a clear and conspicuous manner: (a) The amount of each payment that will apply over the term of the loan, including any balloon payment. In variable-rate transactions, payments that will be determined based on application of an index and margin must be disclosed based on a reasonably current index and margin; (b) the period of time during which each payment will apply; and (c) in an advertisement for credit secured by a first lien on a dwelling, the fact that the payments do not include amounts for taxes and insurance premiums, if applicable, and that the actual payment obligation will be greater. These requirements are in addition to the disclosure requirements of § 226.24(d).

As proposed, comment 24(f)(3)–2 specifically addresses how this requirement applies in the context of advertisements for variable-rate transactions. For such transactions, if the payment that applies at consummation is based on the index and margin that will be used to make subsequent payment adjustments over the term of the loan, then there is only one payment that must be disclosed and the requirements of § 226.24(f)(3) do not apply. If, however, the payment that applies at consummation is not based on the index and margin that will be used to make subsequent payment adjustments over the term of the loan, then there is more than one payment that must be disclosed and the requirements of § 226.24(f)(3) apply.

As discussed above in regard to § 226.24(f)(2), the revisions in § 226.24(f)(3) generally assume that a single index and margin will be used to make rate or payment adjustments under the loan. If a loan's rate or payment adjustments will be based on only one index and margin for each consumer, the fact that the advertised rate or payment may not be available to all consumers does trigger the requirements of § 226.24(f).

The rule adopts the clear and conspicuous standard for the disclosure of payments in advertisements for home-secured loans as proposed. Under this standard, the information required to be disclosed under § 226.24(f)(3) regarding the amounts and time periods of payments must be disclosed with equal prominence and in close proximity to any advertised payment that triggered the required disclosures. The information required to be disclosed under § 226.24(f)(3) regarding the fact that taxes and insurance premiums are not included in the payment must be prominently disclosed and in close proximity to the advertised payments. The Board believes that requiring the disclosure about taxes and insurance premiums to be equally prominent could distract consumers from the key payment and time period information. As noted above, comment 24(f)–2 provides safe harbors for compliance with the equal prominence and close proximity standards. Comment 24(f)–3 provides a cross-reference to the comment 24(b)–2, which provides further guidance regarding the application of the clear and conspicuous standard in this context.

Comment 24(f)–4, renumbered but otherwise as proposed, clarifies how the rules on disclosures of rates and payments in advertisements apply to the use of comparisons in advertisements. This commentary covers both rate and payment comparisons, but in practice, comparisons in advertisements usually focus on payments.

Comment 24(f)(3)–1, clarifies that the requirement to disclose the amounts and time periods of all payments that will apply over the term of the loan may require the disclosure of several payment amounts, including any balloon payment. The comment provides an illustrative example. The commentary has been modified from the proposal, in response to comment, to add a clarification that the final scheduled payment in a fully amortizing loan need not be disclosed if the final scheduled payment is not greater than two times the amount of any other regularly scheduled payment.

Comment 24(f)–6, renumbered but otherwise as proposed, provides safe harbors for what constitutes a ''reasonably current index and margin'' as used in § 226.24(f). Under the commentary, the time period during which an index and margin is considered reasonably current depends on the medium in which the advertisement was distributed. For direct mail advertisements, a reasonably current index and margin is one that was in effect within 60 days before mailing. For printed advertisements made available to the general public and for advertisements in electronic form, a reasonably current index and margin is one that was in effect within 30 days before printing, or before the advertisement was sent to a consumer's e-mail address, or for advertisements made on an Internet Web site, when viewed by the public.

Section 226.24(f)(4)—Envelope excluded. As proposed, § 226.24(f)(4) provides that the requirements of §§ 226.24(f)(2) and (3) do not apply to envelopes or to banner advertisements and pop-up advertisements that are linked to an electronic application or solicitation provided electronically. In the Board's view, banner advertisements and pop-up advertisements are similar to envelopes in the direct mail context.

Section 226.24(g)—Alternative Disclosures—Television or Radio Advertisements

The Board proposed to add a new § 226.24(g) to allow alternative disclosures to be provided in oral television and radio advertisements pursuant to its authority under TILA §§ 105(a), 122, and 144. The final rule is modified from the proposal in that it allows alternative disclosures not only for information provided orally, but also for information provided in visual text in television advertisements. Some commenters noted a discrepancy between the Board's proposed § 226.24(g), which would not allow the alternative disclosures for visual text in television advertisements for closed-end credit, and proposed § 226.16(f), which would allow the alternative disclosures for visual text in television advertisements for open-end credit, and urged the Board to follow the approach found in § 226.16(f). The Board believes that the same reasoning that applies to allowing alternative disclosures in oral radio and television advertisements also applies to allowing alternative disclosures for visual text television advertisements and the final rule is revised accordingly. With one modification, § 226.24(g) follows the proposal for allowing alternative disclosures in radio and television advertisements. One option is to state clearly and conspicuously each of the disclosures required by § 226.24(d)(2) if a triggering term is stated in the advertisement. Another option is for the advertisement to state clearly and conspicuously the APR applicable to the loan, and the fact that the rate may be increased after consummation, if applicable. However, instead of disclosing the required information about the amount or percentage of the downpayment and the terms of repayment, the advertisement could provide a toll-free telephone number, or a telephone number that allows a consumer to reverse the phone charges, that the consumer may call to receive more information. (The language from proposed comment 24(g)–1, which permitted the use of a telephone number that allows a consumer to reverse the phone charges, has been incorporated into the text of § 226.24(g), and proposed comment 24(g)–1 has been removed.) Given the space and time constraints on television and radio advertisements, the required disclosures may go unnoticed by consumers or be difficult for them to retain. Thus, providing an alternative means of disclosure is more effective in many cases given the nature of television and radio media.

This approach is consistent with the approach taken in the proposed revisions to the advertising rules for open-end plans (other than home-secured plans). *See* 72 FR 32948, 33064 (June 14, 2007). This approach is also similar, but not identical, to the approach taken in the advertising rules under Regulation M. *See* 12 CFR 213.7(f). Section 213.7(f)(1)(ii) of Regulation M permits a leasing advertisement made through television or radio to direct the consumer to a written advertisement in a publication of general circulation in a community served by the media station. The Board has not proposed this option because it may not provide sufficient, readily-accessible information to consumers who are shopping for a home-secured loan and because advertisers, particularly those advertising on a regional or national scale, are not likely to use this option.

Section 226.24(h)—Tax Implications

Section 1302 of the Bankruptcy Act amends TILA Section 144(e) to address advertisements that are disseminated in paper form to the public or through the Internet, as opposed to by radio or television, and that relate to an extension of credit secured by a consumer's principal dwelling that may exceed the fair market value of the dwelling. Such advertisements must include a statement that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes. 15 U.S.C. 1664(e). For such advertisements, the statute also requires inclusion of a statement that the consumer should consult a tax adviser for further information on the deductibility of the interest.

The Bankruptcy Act also requires that disclosures be provided at the time of application in cases where the extension of credit may exceed the fair market value of the dwelling. *See* 15 U.S.C. 1638(a)(15). The Board intends to implement the application disclosure portion of the Bankruptcy Act during its forthcoming review of closed-end and HELOC disclosures under TILA. However, the Board requested comment on the implementation of both the advertising and application disclosures under this provision of the Bankruptcy Act for open-end credit in its October 17, 2005, ANPR. 70 FR 60235, 60244 (Oct. 17, 2005). A majority of comments on this issue addressed only the application disclosure requirement, but some commenters specifically addressed the advertising disclosure requirement. One industry commenter suggested that the advertising disclosure requirement apply only in cases where the advertised product allows for the credit to exceed the fair market value of the dwelling. Other industry commenters suggested that the requirement apply only to advertisements for products that are intended to exceed the fair market value of the dwelling.

The Board proposed to add § 226.24(h) and comment 24(h)–1 to implement TILA Section 144(e). The Board's proposal applied the new requirements to advertisements for home-secured loans where the advertised extension of credit may, by its terms, exceed the fair market value of the dwelling. The Board sought comment on whether the new requirements should instead apply to only advertisements that state or imply that the creditor provides extensions of credit greater than the fair market value of the dwelling. Of the few commenters who addressed this issue, the majority were in favor of the alternative approach because many home-secured loans may, in some circumstances, allow for extensions of credit greater than the fair market value of the dwelling and advertisers would likely include the disclosure in nearly all advertisements.

The final rule differs from the proposed rule and requires that the additional tax implication disclosures be given only when an advertisement states that extensions of credit greater than the fair market value of the dwelling are available. The rule does not apply to advertisements that merely imply that extensions of credit greater than the fair market value of the dwelling may occur. By limiting the required disclosures to only those advertisements that state that extensions of credit greater than the fair market value of the dwelling are available, the Board believes the rule will provide the required disclosures to consumers when they are most likely to be receptive to the information while avoiding overloading consumers with information about the tax consequences of home-secured loans when it is less likely to be meaningful to them. Accordingly, proposed comment 24(h)–1 is removed as no longer necessary.

Section 226.24(i)—Prohibited Acts or Practices in Mortgage Advertisements

The Board proposed to add § 226.24(i) to prohibit the following seven acts or practices in connection with advertisements of closed-end mortgage loans: (1) The use of the term ''fixed'' to refer to rates or payments of closed-end home loans, unless certain conditions are satisfied; (2) comparison advertisements between actual and hypothetical rates and payments, unless certain conditions are satisfied; (3) falsely advertising a loan as government supported or endorsed; (4) displaying the name of the consumer's current lender without disclosing that the advertising mortgage lender is not affiliated with such current lender; (5) claiming debt elimination when one debt merely replaces another debt; (6) the use of the term ''counselor'' or ''financial advisor'' by for-profit brokers or lenders; and (7) foreign language advertisements that provide required disclosures only in English.

Pursuant to its authority under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), the Board is adopting § 226.24(i) substantially as proposed with modifications to § 226.24(i)(2) to clarify that the information required to be disclosed in comparison advertisements is the information required under § 226.24(f), to § 226.24(i)(6) to withdraw the prohibition on the use of the term ''financial advisor,'' and other modifications to clarify the scope and intent of the rule. The final rule applies only to closed-end mortgage loans. Section 129(l)(2) of TILA gives the Board the authority to prohibit acts or practices in connection with mortgage loans that it finds to be unfair or deceptive. Section 129(l)(2) of TILA also gives the Board the authority to prohibit acts or practices in connection with the refinancing of mortgage loans that the Board finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower. 15 U.S.C. 1639(l)(2). Through an extensive review of advertising copy and other outreach efforts, Board staff identified a number of acts or practices connected with mortgage and mortgage refinancing advertising that appear to be inconsistent with the standards set forth in Section 129(l)(2) of TILA.

The Board has sought to craft the rules carefully to make compliance with the requirements sufficiently clear and has provided additional examples in commentary to assist compliance with this rule. As discussed above, the Board is not extending the seven prohibitions on misleading advertisements to HELOCs because it has not been provided with, or found, sufficient evidence demonstrating that HELOC advertisements contain deceptive practices similar to those found in advertisements for closed-end mortgage loans. However, the Board may consider, as part of its larger review of HELOC rules, prohibiting certain misleading or deceptive practices if warranted. The Board notes that closed-end mortgage loan advertisements (as well as HELOCs) must continue to comply with all applicable state and federal laws, including Section 5 of the FTC Act.[121]

Public comment. The Board specifically sought comment on the appropriateness of the seven proposed prohibitions; whether the Board should prohibit any additional misleading or deceptive acts or practices; and whether the prohibitions should be extended to advertisements for open-end home equity lines of credit (HELOCs).

Consumer and community advocacy groups, associations of state regulators, federal agencies, and most industry commenters supported the Board's efforts to address misleading advertising acts and practices. Many creditors and their trade associations, however, urged the Board to use its authority under TILA Section 105(a), 15 U.S.C. 1604(a), rather than Section 129(l)(2), 15 U.S.C. 1639(l)(2), to prohibit certain advertising acts or practices for closed-end mortgage loans. These commenters expressed concern that promulgating the prohibitions under Section 129(l)(2) may expose creditors to extensive private legal action for inadvertent technical violations.

Commenters were divided on whether to extend the proposed prohibitions to HELOCs. Many community banks agreed with the Board that the misleading or deceptive acts often associated with mortgage and mortgage refinancing advertisements do not occur in HELOC advertisements. Some consumer groups and state regulators, however, urged the Board to extend all of the prohibitions to HELOCs. One large creditor offered specific suggestions on how to extend the prohibitions to HELOCs, while another sought extension of only the prohibition on the misleading use of the current lender's name. Few commenters suggested that the Board consider any additional prohibitions on misleading advertising either for closed-end mortgage loans or HELOCs. A more detailed discussion of the comments is provided below.

Section 226.24(i)(1)—Misleading advertising for ''fixed'' rates, payments or loans. Proposed § 226.24(i)(1) prohibited the use of the term ''fixed'' in advertisements for credit secured by a dwelling, unless certain conditions are satisfied, in three different scenarios: (i) Advertisements for variable-rate transactions; (ii) advertisements for non-variable-rate transactions in which the interest rate can increase; and (iii) advertisements that promote both variable-rate transactions and non-variable-rate transactions. The proposed rule prohibited the use of the term ''fixed'' in advertisements for variable-rate transactions, unless two conditions are satisfied. First, the phrase ''Adjustable-Rate Mortgage'' or ''Variable-Rate Mortgage'' must appear in the advertisement before the first use of the word ''fixed'' and be at least as conspicuous as every use of the word ''fixed.'' Second, each use of the word ''fixed'' must be accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed and the fact that the rate may vary or the payment may increase after that period.

The proposed rule also prohibited the use of the term ''fixed'' to refer to the payment in advertisements solely for non-variable-rate transactions where the payment will increase (for example, fixed-rate mortgage transactions with an initial lower payment that will increase), unless each use of the word ''fixed'' to refer to the payment is accompanied by an equally prominent and closely proximate statement of the time period for which the payment is fixed and the fact that the payment will increase after that period.

Finally, the proposed rule prohibited the use of the term ''fixed'' in advertisements that promote both variable-rate transactions and non-variable-rate transactions, unless certain conditions are satisfied. First, the phrase ''Adjustable-Rate Mortgage,'' ''Variable-Rate Mortgage,'' or ''ARM'' must appear in the advertisement with equal prominence as any use of the word ''fixed.'' Second, each use of the term ''fixed'' to refer to a rate, payment, or to the credit transaction, must clearly refer solely to transactions for which rates are

[121] 15 U.S.C. 41 *et seq.*

fixed and, if used to refer to a payment, be accompanied by an equally prominent and closely proximate statement of the time period for which the payment is fixed and the fact that the payment will increase after that period. Third, if the term ''fixed'' refers to the variable-rate transactions, it must be accompanied by an equally prominent and closely proximate statement of a time period for which the rate or payment is fixed, and the fact that the rate may vary or the payment may increase after that period.

Many creditors and their trade associations argued that the proposed prohibition contained many formatting and language requirements, and therefore could easily generate liability for technical, inadvertent errors. These commenters opposed the possible risk of civil liability for violations of this proposed rule and instead, urged the Board to use its authority under TILA Section 105(a), 15 U.S.C. 1604(a). One mortgage banking group suggested that if the Board promulgated the rule it should not prescribe detailed formatting rules but rather state that compliance with the rules governing trigger terms in § 226.24 satisfies compliance with this rule. Another bank commented that requiring disclosure after each use of the word ''fixed'' is excessive and suggested that the disclosure be required only once after the first use of the word.

In contrast, a number of consumer groups, as well as the FDIC and associations of state regulators, urged the Board to prohibit the use of the word ''fixed'' in advertisements for variable-rate mortgages, including ones that have a fixed-rate for a specified time period. They argued that the word ''fixed'' is confusing to consumers when used to reference any loan other than those that have rates (or payments) fixed for their entire term.

The Board is adopting the prohibition on the use of the term ''fixed'' to refer to rates or payments of closed-end home-secured loans as proposed with a modification to § 226.24(i)(1)(ii) to clarify application of the rule to non-variable-rate transactions. Based on its review of advertising copy, the Board finds that some advertisements do not adequately disclose that the interest rate or payment amounts are ''fixed'' only for a limited period of time, rather than for the full term of the loan. For example, some advertisements reviewed prominently refer to a ''30–Year Fixed Rate Loan'' or ''Fixed Pay Rate Loan'' on the first page. A footnote on the last page of the advertisements discloses in small type that the loan product is a payment option ARM in which the fully indexed rate and fully amortizing payment will be applied after the first five years.

The Board concludes that these types of advertisements are associated with abusive lending practices and also deceptive under the three-part test for deception set forth in Part V.A above.[122] The use of the word ''fixed'' in these advertisements is likely to mislead consumers into believing that the advertised product is a fixed-rate mortgage with rates and payments that will not change during the term of the loan. Consumers often shop for loans based on whether the term is fixed or not. Indeed, some credit counselors often encourage consumers to shop only for fixed-rate mortgages. Therefore, information about a mortgage loan's monthly payment or interest rate is important to consumers. As a result, the length of time for which the payment or interest rate will remain fixed is likely to affect a consumer's decision about whether to apply for a loan product.

The final rule does not, however, prohibit use of the word ''fixed'' in advertisements for home-secured loans where the use of the term is not misleading. Advertisements that refer to a rate or payment, or to the credit transaction, as ''fixed'' are appropriate when used to denote a fixed-rate mortgage in which the rate or payment amounts do not change over the full term of the loan. Use of the term ''fixed'' also is appropriate in an advertisement where the interest rate or payment may increase solely because the loan product features a preferred-rate or fixed-rate conversion provision (*see* comment 24(f)–1 for further guidance), or where the final scheduled payment in a fully amortizing loan is not greater than twice the amount of other regularly scheduled payments. The Board does not intend that this rule apply to the use of the word ''fixed'' in advertisements for home-secured loans that refers to fees or settlements costs.

The final rule does not ban the use of the term ''fixed'' in advertisements for variable rate products. The term ''fixed'' is used in connection with adjustable-rate mortgages, or with fixed-rate mortgages that include low initial payments that will increase. These advertisements make clear that the rate or payment is only ''fixed'' for a defined period of time, but after that the rate or payment may increase. For example, one advertisement reviewed prominently discloses that the product is an ''Adjustable-Rate Mortgage'' in large type, and clearly discloses in standard type that the rate is ''fixed'' for the first three, five, or seven years depending upon the product selected and may increase after that time period. Such an advertisement demonstrates that there are legitimate and appropriate circumstances for using the term ''fixed'' in advertisements for variable-rate transactions.

Section 226.24(i)(2)—Misleading comparisons in advertisements. Proposed § 226.24(i)(2) prohibited any advertisement for credit secured by a dwelling from making any comparison between actual or hypothetical payments or rates and the payment or simple annual rate that will be available under the advertised product for less than the term of the loan, unless two conditions are satisfied. First, the comparison must include with equal prominence and in close proximity to the ''teaser'' payment or rate, all applicable payments or rates for the advertised product that will apply over the term of the loan and the period of time for which each applicable payment or simple annual rate will apply.

Second, the advertisement must include a prominent statement in close proximity to the advertised payments that such payments do not include amounts for taxes and insurance premiums, if applicable. In the case of advertisements for variable-rate transactions where the advertised payment or simple annual rate is based on the index and margin that will be used to make subsequent rate or payment adjustments over the term of the loan, the comparison must include: (a) An equally prominent statement in close proximity to the advertised payment or rate that the payment or rate is subject to adjustment and the time period when the first adjustment will occur; and (b) a prominent statement in close proximity to the advertised payment that the payment does not include amounts for taxes and insurance premiums, if applicable.

Proposed comment 24(i)–1 clarified that a comparison includes a claim about the amount that a consumer may save under the advertised product. For example, a statement such as ''save $600 per month on a $500,000 loan'' constitutes an implied comparison between the advertised product's payment and a consumer's current payment.

The Board did not propose to prohibit comparisons that take into account the consolidation of non-mortgage credit, such as auto loans, installment loans, or

[122] There must be a representation, omission or practice that is likely to mislead the consumer; the act or practice is examined from the perspective of a consumer acting reasonably in the circumstances; and the representation, omission, or practice must be material—that is, it must be likely to affect the consumer's conduct or decision with regard to a product or service.

revolving credit card debt, into a single, home-secured loan. However, the Board specifically sought comment on whether comparisons based on the assumed refinancing of non-mortgage debt into a new home-secured loan are associated with abusive lending practices or otherwise not in the interest of the borrower and should therefore be prohibited as well.

Creditors and their trade groups, consumer and community advocacy groups, federal agencies, and associations of state regulators largely supported the proposed requirement that advertisements showing comparisons between actual or hypothetical rate or payments and the advertised rate or payment disclose information about the rates or payments that would apply for the term of the advertised loan and the period of time for which such rates or payments would be in effect. One mortgage banking trade group suggested that the proposed revisions to the trigger term requirements would sufficiently address issues with comparison advertisements and that a separate rule was unnecessary. Another commenter requested an exception for subordinate lien loans from the escrow disclosure component of the rule noting that the monthly payments of subordinate liens do not generally include escrows for taxes and insurance.

Commenters were divided on whether comparisons between non-mortgage debt and mortgage debt should be allowed. Industry commenters generally supported the Board's decision to allow debt consolidation advertisements that compare home-secured debt payments to other debt payments. They noted that debt consolidation offers consumers concrete benefits, such as increased cash flow or reduced interest rates, and that advertising communicated these choices to consumers. One bank commenter suggested that the Board require additional disclosures to alert consumers to the potential consequences of such debt consolidation, such as closing costs and loan duration. On the other hand, associations of state regulators urged the Board to ban debt consolidation comparison advertisements entirely. They argued that consumers could be misled about the risks and benefits of consolidating short-term unsecured debt into long-term secured debt.

One large bank, however, pointed out that the interest rates that could be disclosed for closed-end home-secured debt would be different than the rates for other kinds of secured debt in debt consolidation comparison advertisements. The commenter noted that under the proposed revisions to § 226.24(c), advertisements for home-secured loans would be allowed to use only the APR, which would include finance charges, while advertisements for other closed-end loans, such as auto loans, would be permitted to promote simple annual rates of interest along with APRs, and advertisements from open-end credit would be able to disclose APRs that did not have to include any finance charges.

The Board is adopting the prohibition proposed in § 226.24(i)(2) on the comparison of actual and hypothetical rates in advertisements unless certain conditions are satisfied. The final rule is modified to clarify that the information required to be disclosed in conjunction with the advertised rate or payment is the information required under §§ 226.24(f)(2) and (3). By referencing § 226.24(f), the final rule incorporates, without repeating, the requirements of that section. By referencing § 226.24(f)(3), the final rule exempts subordinate lien loans from the escrow disclosure component of the rule. In addition, the final rule maintains the proposed requirement that advertisements making comparisons to a variable-rate transaction, where the advertised payment or simple annual rate is based on the index and margin that will be used to make subsequent rate or payment adjustments over the term of the loan, must include an equally prominent statement in close proximity to the payment or rate that the payment or rate is subject to adjustment and the time period when the first adjustment will occur.

Some advertisements for home-secured loans make comparisons between actual or hypothetical rate or payment obligations and the rates or payments that would apply if the consumer obtains the advertised product. The advertised rates or payments used in these comparisons frequently are low introductory ''teaser'' rates or payments that will not apply over the full term of the loan, and do not include amounts for taxes or insurance premiums. In addition, the current rate or payment obligations used in these comparisons frequently include not only the consumer's mortgage payment, but also possible payments for short-term, non-home secured, or revolving credit obligations, such as auto loans, installment loans, or credit card debts.

The Board finds these types of comparisons of rates and payments in advertisements to be deceptive under the three-part test for deception set forth in part V.A above. Making comparisons in advertisements can mislead a consumer if the advertisement compares the consumer's current payments or rates to payments or rates available for the advertised product that will only be in effect for a limited period of time, rather than for the term of the loan. Similarly, the Board finds that such comparisons can be misleading if the consumer's current payments include amounts for taxes and insurance premiums, but the payments for the advertised product do not include those amounts. Information about the terms of the loan, such as rate and monthly payment, are material and likely to affect a consumer's decision about whether to apply for the advertised mortgage loan. Consumers may compare current obligations and the lower advertised rates or payments and conclude that the advertised loan product will offer them a better interest rate and/or monthly payment.

Some industry commenters requested that, consistent with § 226.24(f), the rule require information about amounts for taxes and insurance premiums only for advertisements for first-lien loans. By incorporating the requirements of § 226.24(f), the final rule excludes advertisements for subordinate lien loans from the requirement that the advertisement include a prominent statement in close proximity to the advertised payment that the payment does not include amounts for taxes and insurance premiums, if applicable. Monthly payments of subordinate lien loans do not generally require escrows for taxes and insurance and therefore are unable to include such amounts in any monthly payment calculation. Moreover, subordinate lien loans are generally advertised for the purpose of replacing or consolidating other subordinate lien loans or non-home secured obligations rather than home-secured first-lien loans.

The Board also is not banning debt consolidation advertisements or requiring additional disclosures about the cost or consequences of consolidating short term unsecured debt into longer term secured debt. The Board believes that debt consolidation can be beneficial for some consumers. Prohibiting the use of comparisons in advertisements that are based solely on low introductory ''teaser'' rates or payments should address abusive practices in advertisements focused on debt consolidation. However, additional disclosures are unlikely to provide consumers with meaningful information at the advertising stage or be effective against aggressive push marketing tactics inherent in many advertisements.

Last, the Board emphasizes that under the final rule, the interest rate stated for a home-secured loan must be the APR.

The final rule permits, but does not require, an interest rate for any secured debt to be advertised also as a simple annual rate of interest. The Board notes that § 226.24(b) allows the simple annual interest rate that is applied to an unpaid balance to be stated so long as it is not advertised more conspicuously than the APR. Revisions to § 226.24(c) also allow the use of a simple annual rate of interest that is applied to an unpaid balance to be stated in an advertisement for a home-secured loan so long as it is not advertised more conspicuously than the APR. In addition, the Board's review of advertisements shows that many of the comparison advertisements compared monthly payments rather than interest rates, perhaps because comparison of monthly payments resonate more for consumers than comparison of interest rates.

Section 226.24(i)(3)—Misrepresentations about government endorsement. Proposed § 226.24(i)(3) prohibited statements about government endorsement unless the advertisement is for an FHA loan, VA loan, or similar loan program that is, in fact, endorsed or sponsored by a federal, state, or local government entity. Proposed comment 24(i)–2 illustrated that a misrepresentation about government endorsement would include a statement that the federal Community Reinvestment Act entitles the consumer to refinance his or her mortgage at the new low rate offered in the advertisement because it conveys to the consumer a misleading impression that the advertised product is endorsed or sponsored by the federal government. No commenters objected to this prohibition.

The Board is adopting the rule as proposed. Some advertisements for home-secured loans characterize the products offered as ''government loan programs,'' ''government-supported loans,'' or otherwise endorsed or sponsored by a federal or state government entity, even though the advertised products are not government-supported loans, such as FHA or VA loans, or otherwise endorsed or sponsored by any federal, state, or local government entity. Such advertisements can mislead consumers into believing that the government is guaranteeing, endorsing, or supporting the advertised loan product. Government-endorsed loans often offer certain benefits or features that may be attractive to many consumers and not otherwise available through private lenders. As a result, the fact that a loan product is associated with a government loan program can be a material factor in the consumer's decision to apply for that particular loan product. For these reasons, the Board finds these types of advertisements to be deceptive under the three-part test for deception set forth in part V.A above.

Section 226.24(i)(4)—Misleading use of the current mortgage lender's name. Proposed § 226.24(i)(4) prohibited any advertisement for a home-secured loan, such as a letter, that is not sent by or on behalf of the consumer's current lender from using the name of the consumer's current lender, unless the advertisement also discloses with equal prominence: (a) the name of the person or creditor making the advertisement; and (b) a clear and conspicuous statement that the person making the advertisement is not associated with, or acting on behalf of, the consumer's current lender.

Many creditors and their trade groups, state regulators, and other commenters offered strong support for the proposed prohibition on the misleading use of a consumer's current mortgage lender's name. State regulators noted that some states have similar requirements already in place and have a history of enforcement in this area. A credit union association suggested that the Board ban the use of a mortgage lender's name without that lender's permission outright, as is currently done in some states, rather than requiring a disclosure. A mortgage banking trade group and a large creditor suggested that the regulation clarify that the envelope or other mailing materials are part of any advertisement and that the required disclosure be closely proximate, as well as equally prominent, to the statement of the current lender's name.

The Board is adopting the rule as proposed. Some advertisements for home-secured loans prominently display the name of the consumer's current mortgage lender, while failing to disclose or to disclose adequately the fact that the advertisement is by a mortgage lender that is not associated with the consumer's current lender. The Board finds that such advertisements may mislead consumers into believing that their current lender is offering the loan advertised or that the loan terms stated in the advertisement constitute a reduction in the consumer's payment amount or rate, rather than an offer to refinance the current loan with a different creditor. For these reasons, the Board finds these types of advertisements to be deceptive under the three-part test for deception set forth in part V.A above.

Section 226.24(i)(5)—Misleading claims of debt elimination. Proposed § 226.24(i)(5) prohibited advertisements for credit secured by a dwelling that offer to eliminate debt, or waive or forgive a consumer's existing loan terms or obligations to another creditor. Proposed comment 24(i)–3 provided examples of claims that would be prohibited. These include the following claims: ''Wipe Out Personal Debts!'', ''New DEBT-FREE Payment'', ''Set yourself free; get out of debt today'', ''Refinance today and wipe your debt clean!'', ''Get yourself out of debt * * * Forever!'', and, in the context of an advertisement referring to a consumer's existing obligations to another creditor, ''Pre-payment Penalty Waiver.'' The proposed comment also clarified that this provision does not prohibit an advertisement for a home-secured loan from claiming that the advertised product may reduce debt payments, consolidate debts, or shorten the term of the debt.

Most commenters supported the Board's proposal to prohibit misleading claims of debt elimination. A number of industry commenters also expressed support for the proposed commentary provision clarifying that advertisements could still claim to consolidate or reduce debt. However, one bank suggested that there were examples of non-misleading claims of debt elimination, such as ''eliminate high interest credit card debt.''

The Board is modifying the rule to clarify that only misleading claims of debt elimination are prohibited. Based on the advertising copy reviewed, some advertisements for home-secured loans include statements that promise to eliminate, cancel, wipe-out, waive, or forgive debt. The Board finds that such advertisements can mislead consumers into believing that they are entering into a debt forgiveness program rather than merely replacing one debt obligation with another. For these reasons, the Board finds these types of advertisements to be deceptive under the three-part test for deception set forth in part V.A above.

Section 226.24(i)(6)—Misleading use of the term ''counselor''. Proposed § 226.24(i)(6) prohibited advertisements for credit secured by a dwelling from using the terms ''counselor'' or ''financial advisor'' to refer to a for-profit mortgage broker or creditor, its employees, or persons working for the broker or creditor that are involved in offering, originating or selling mortgages. Nothing in the proposed rule prohibited advertisements for bona fide consumer credit counseling services, such as counseling services provided by non-profit organizations, or bona fide financial advisory services, such as services provided by certified financial planners. The final rule retains the prohibition on the use of the term ''counselor'' by for-profit brokers or creditors in advertisements for home-secured credit, but does not adopt the prohibition on the use of the term ''financial advisor'' for the reasons stated below.

A few creditors and financial services and securities industry associations argued that the proposed prohibition on the term ''financial advisor'' was too broad. These commenters noted that registered securities broker-dealers and other licensed financial professionals, who may also be licensed as mortgage brokers if required under applicable state law, may place advertisements for mortgage loans, often in conjunction with a range of other financial products. One large securities firm noted that its financial advisors routinely refer customers to its credit corporation subsidiary and that these financial advisors may place advertisements listing themselves as contact persons for a range of services and products, including residential mortgage loans. These commenters suggested that the Board provide a clear exception for registered securities broker-dealers and other investment advisors.

An association of certified mortgage planning specialists suggested a safe harbor for the use of the term ''financial advisor'' for those advertisers who have earned a title or designation that requires an examination or experience, adherence to a code of ethics, and continuing education. This commenter suggested that advertisers that did not have fiduciary relationships with consumers be required to include a disclaimer in their ads so stating.

The Board is not adopting the prohibition on the use of the term ''financial advisor'' as proposed in § 226.24(i)(6). The Board recognizes that financial advisors play a legitimate role in assisting consumers in selecting appropriate home-secured loans. The prohibition on the term ''financial advisor'' was intended to prevent creditors and brokers from falsely implying to residential mortgage consumers that they are acting in a fiduciary capacity when, in fact, they are not. However, the Board did not intend to prevent the legitimate business use of, or otherwise conflict or intervene with federal and state laws that contemplate the use of, the term ''financial advisor.''[123]

For example, securities broker-dealers typically are registered by the U.S. Securities and Exchange Commission and/or licensed by a state regulatory agency to provide a range of financial advice and services on securities, insurance, retirement planning and other financial products, including residential mortgage loans. These registered securities broker-dealers currently use the term ''financial advisor'' in advertisements and solicitations. There are also other financial professionals who must meet certain federal or state professional standards, certifications or other requirements and use the term ''financial advisor'' because they are in the business of providing financial planning and advice. Examples include investment advisors, certified public accountants, and certified financial planners. Many of these professionals are obligated to act in the client's interest and disclose conflicts of interest (*i.e.*, owe a fiduciary obligation) and therefore, the use of the term ''financial advisor'' by such individuals is not misleading.[124] Because it is not practical to distinguish with sufficient clarity the legitimate uses of the term ''financial advisor'' in accordance with various federal or state laws, from improper use, the Board is withdrawing the prohibition on the term ''financial advisor.'' However, the Board notes that the use of the term ''financial advisor'' in mortgage advertisements must comply with all applicable state and federal laws, including the FTC Act.[125]

The Board is retaining the prohibition on the use of the term counselor. The Board believes that the exception to this prohibition for not-for-profit entities is sufficient to capture the legitimate use of this term. The use of the term counselor outside of this context is likely to mislead consumers into believing that the lender or broker has a fiduciary relationship with the consumer and is considering only the consumer's best interest. For these reasons, the Board finds these types of advertisements to be deceptive under the three-part test for deception set forth in part V.A above.

Section 226.24(i)(7)—Misleading foreign-language advertisements. Proposed § 226.24(i)(7) prohibited advertisements for home-secured loans from providing information about some trigger terms or required disclosures, such as an initial rate or payment, only in a foreign language, but providing information about other trigger terms or required disclosures, such as information about the fully-indexed rate or fully amortizing payment, only in English. Advertisements that provide all disclosures in both English and a foreign language or advertisements that provide disclosures entirely in English or entirely in a foreign language would not be affected by this prohibition.

Most commenters expressed support for the prohibition on advertising triggering information in a foreign language and then providing information about other trigger terms or required disclosures in English.

The Board is adopting the rule as proposed. Some advertisements for home-secured loans are targeted to non-English speaking consumers. In general, this is an appropriate means of promoting home ownership or offering loans to under-served, immigrant communities. Some of these advertisements, however, provide information about some trigger terms or required disclosures, such as a low introductory ''teaser'' rate or payment, in a foreign language, but provide information about other trigger terms or required disclosures, such as the fully-indexed rate or fully amortizing payment, only in English. The Board finds that this practice can mislead non-English speaking consumers who may not be able to comprehend the important English-language disclosures. For these reasons, the Board finds these types of advertisements to be deceptive under the three-part test for deception set forth in part V.A above.

XII. Mortgage Loan Disclosures

A. Early Mortgage Loan Disclosures—§ 226.19

Pursuant to its authority under TILA Section 105(a), 15 U.S.C. 1604(a), the Board proposed to require creditors to give consumers transaction-specific, early mortgage loan disclosures for closed-end loans secured by a consumer's principal dwelling, including refinancings, home equity loans (other than HELOCs) and reverse mortgages. The proposed rule would require that creditors deliver this disclosure not later than three business days after application and before a consumer pays a fee to any person, other than a fee for obtaining the consumer's credit history. The Board also proposed corresponding changes to the staff commentary and certain other conforming amendments to Regulation Z. Providing the mortgage loan disclosure early for all mortgage transactions, and before consumers have paid significant fees, would help consumers make informed use of credit and better enable them to shop among available credit alternatives.

The Board is adopting § 226.19(a)(1) as proposed, with new commentary to

[123] *See, e.g.*, Investment Advisors Act of 1940, 14 U.S.C. 80b–1 *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*

[124] 14 U.S.C. 80b–1 *et seq.*

[125] 15 U.S.C. 41 *et seq.*

address concerns about application of the fee restriction to third parties, such as mortgage brokers. The early mortgage loan disclosure rule is effective for loans for which a creditor has received an application on or after October 1, 2009.

Public Comment

The Board sought comment on whether the benefits of requiring the early mortgage loan disclosure would outweigh operational or other costs, and whether further guidance was necessary to clarify what fees would be deemed in connection with an application.

Many creditors and their trade associations opposed the proposal, arguing that the operational cost and compliance difficulties (for example, system reprogramming, testing, procedural changes, and staff training) outweigh the benefits of improving consumers' ability to shop among alternative loans. They noted that the burden may be significant for some creditors, such as community banks. Citing operational difficulties, many industry commenters requested a compliance period of up to 18 months from the effective date of the final rule. They also expressed concern about the scope of the fee restriction and its application to third party originators.

Consumer groups, state regulators and enforcement agencies that commented on proposed § 226.19(a)(1) generally supported the proposed rule because it would increase the availability of information to consumers when they are shopping for loans. Some, however, argued for greater enforceability and redisclosure before consummation of the loan transaction to enhance the accuracy of the information disclosed.

Discussion

TILA Section 128(b)(1), 15 U.S.C. 1638(b)(1), provides that the closed-end credit disclosure (mortgage loan disclosure), which includes the APR and other material disclosures, must be delivered ''before the credit is extended.'' Regulation Z currently implements this statutory provision by allowing creditors to provide the disclosures at any time before consummation. TILA Section 128(b)(2) and § 226.19 of Regulation Z apply to ''residential mortgage transactions'' subject to RESPA and require that ''good faith estimates'' of the mortgage loan disclosure be made before the credit is extended, or delivered not later than three business days after the creditor receives the consumer's written application, whichever is earlier. 15 U.S.C. 1638(b)(2). A residential mortgage transaction includes loans to finance the acquisition or initial construction of a consumer's dwelling but does not include refinance or home-equity loans. The Board proposed to amend Regulation Z to implement TILA Section 128(b)(1) in a manner that would require the disclosures earlier in the mortgage transaction, rather than at any time before consummation, which would result in a requirement similar to TILA Section 128(b)(2).

The final rule is issued pursuant to TILA Section 105(a), which mandates that the Board prescribe regulations to carry out TILA's purposes. 15 U.S.C. 1604(a). TILA Section 102(a) provides, in pertinent part, that TILA's purposes are to assure a meaningful disclosure of credit terms so that the consumer is better able to compare various credit terms available and avoid the uninformed use of credit. 15 U.S.C. 1601(a). The final rule is intended to help consumers make informed use of credit and shop among available credit alternatives.

Under current Regulation Z, creditors need not deliver a mortgage loan disclosure on non-purchase mortgage transactions until consummation. As a practical matter, consumers commonly do not receive disclosures until the closing table. By that time consumers may not be in a position to make meaningful use of the disclosure. Once consumers have reached the settlement table, it is likely too late for them to use the disclosure to shop for mortgages or to inform themselves adequately of the terms of the loan. Consumers receive at settlement a large, often overwhelming, number of documents, and may not reasonably be able to focus adequate attention on the mortgage loan disclosure to verify that it reflects what they believe to be the loan's terms. Moreover, by the time of loan consummation, consumers may feel committed to the loan because they are accessing equity for an urgent need, may be refinancing a loan to obtain a lower rate (which may only be available for a short time), or may have already paid substantial application or other fees.

The early mortgage loan disclosure required by the final rule will provide information to consumers about the terms of the loan, such as the payment schedule, earlier in the shopping process. For example, ARMs may have a low, initial fixed rate period followed by a higher variable rate based on an index plus margin. Some fixed rate loans also may have a temporary initial rate that is discounted. These loans may be marketed to consumers on the basis of the low initial payment or the low initial interest rate. The payment schedule will show the increases in monthly payments when the rate increases. It will also show an APR for the full loan term based on the fully indexed rate instead of the initial rate. Providing this information not later than three business days after application, and before the consumer has paid a substantial fee, will help ensure that consumers have a genuine opportunity to review the credit terms offered; that the terms are consistent with their understanding of the transaction; and that the credit terms meet their needs and are affordable. This information will further enable the consumer to decide whether to move forward with the transaction or continue to shop among alternative loan products and sources of credit.

The Board recognizes that the early mortgage loan disclosure rule will impose additional costs on creditors, some of which may be passed on in part to consumers. Because early disclosures currently are required for home purchase loans, some creditors already deliver early mortgage loan disclosures on non-purchase mortgages. Not all creditors, however, follow this practice, and they will also incur one-time implementation costs to modify their systems in addition to ongoing costs to originate loans. The Board believes, however, that the benefits to consumers of receiving early estimates of loan terms, such as enhanced shopping and competition, offset any additional costs.

The Final Rule

For the reasons discussed below, the Board is adopting the rule as proposed with new staff commentary to address, through examples, the application of the fee restriction to third parties, such as mortgage brokers. The final rule applies to all closed-end loans secured by a consumer's principal dwelling (other than HELOCs) and requires creditors to deliver the early mortgage loan disclosure to consumers no later than three business days after application and before any fee is paid, other than a fee for obtaining the consumer's credit history, such as a credit report.

Third party originators. The Board proposed § 226.19(a)(1)(ii) to prohibit a creditor or any other person from collecting a fee, other than a fee for obtaining the consumer's credit history, until the early mortgage loan disclosure is received by the consumer.

Many creditors and their trade associations argued that the fee restriction would be difficult or impossible to apply and monitor in the wholesale channel, especially with respect to appraisal fees. These commenters noted that third parties, such as mortgage brokers, submit consumer applications to multiple creditors; they expressed concern that under the proposal lenders might have to refuse to accept a new application where the consumer has already paid a fee to a prior creditor but then withdrew the first application or had it denied.

Most creditors also expressed concern that the phrase ''any other person'' would require them to monitor the timing of fees paid to brokers, and stated that they could not track such information accurately. Many creditors requested that the Board clarify whether creditors would have to refuse applications submitted by a broker that already had obtained a fee from the consumer (other than a fee for obtaining the consumer's credit history) because it would be too late for creditors to comply with the timing requirement of the early mortgage loan disclosure. A few commenters urged the Board to limit the fee restriction to fees collected only by creditors.

The Board is adopting the proposed rule without modification but is adding comment 19(a)(1)(ii)–3 to clarify the rule's treatment of applications submitted by third parties, such as mortgage brokers, and to provide examples of compliance with the rule. A broker's submission of a consumer's information (registration) to more than one creditor, and the layered underwriting and approval process that occurs in the wholesale channel, may complicate implementation of the fee restriction. Generally a broker submits a consumer's written application (the trigger for early TILA disclosures under § 226.19(a)(1)(i)) to only one creditor based on product offerings, the consumer's choice, and other factors. Under the final rule, once the creditor receives the consumer's written application, the creditor must provide the early mortgage loan disclosure after which the creditor and/or the broker may collect fees (other than a fee for obtaining the consumer's credit history) from the consumer. However, after the collection of fees, the creditor may engage in further underwriting that could result in a denial of the consumer's application. The broker may then submit the application to a different creditor who must also comply with the final rule.

The Board proposed to regulate the collection of fees by ''any other person'' in § 226.19(a)(1)(ii) to avoid circumvention of the fee restriction. However, in some circumstances it may not be reasonable to expect creditors to know whether the consumer paid a fee to a broker before receiving the early mortgage loan disclosure. Therefore, the Board is adding new comment 19(a)(1)(ii)–3 to illustrate through examples when creditors are in compliance with § 226.19(a)(1)(ii). The new commentary addresses the situation where a mortgage broker submits a consumer's written application to a new creditor because a prior creditor denied the consumer's mortgage application, or the consumer withdrew the application, but the consumer already paid a fee to the prior creditor (aside from a fee for obtaining the consumer's credit history). The comment clarifies that in this situation, the new creditor or third party complies with § 226.19(a)(1)(ii) if it does not collect or impose any additional fee until after the consumer receives an early mortgage loan disclosure from the new creditor.

Many creditors also stated that the rule would inappropriately require them to monitor the actions of third parties. Although the rule does not require creditors to take specific action with respect to monitoring third parties, creditors must comply with this rule whether they deal with consumers directly or indirectly through third parties. Creditors that receive applications through a third party may choose to require through contractual arrangement that the third party include with a consumer's written application a certification, for example, that no fee has been collected in violation of § 226.19(a)(1). The Board also notes that the federal banking agencies have issued guidance that addresses, among other things, systems and controls that should be in place for establishing and maintaining relationship with third parties.[126]

The Board recognizes that unscrupulous third parties may not comply with the fee restriction, regardless of contractual obligations. The Board may consider, as part of its overall review of closed-end disclosures, whether it should propose rules that would directly prohibit third parties from collecting a fee before the consumer receives the early mortgage loan disclosure, other than a fee for obtaining the consumer's credit history.

Scope of the fee restriction. Regulation Z currently does not prohibit creditors from collecting any fee before giving consumers the closed-end credit disclosures required by § 226.19(a)(1). The Board proposed in § 226.19(a)(1)(ii) to prohibit the collection of any fee, other than a fee for obtaining the consumer's credit history, until after the consumer receives the early mortgage loan disclosure. Most industry commenters urged the Board to broaden the fee exception to include, for example, rate lock, appraisal and flood certification fees. They argued that prohibiting these fees could harm consumers in a rising interest rate environment, delay consumers' access to credit (for example, delay conditional approvals, application processing, closing and funding of loans), and reverse the benefits of automated and streamlined mortgage loan processing. Some commenters urged alternatively that the Board restrict only the imposition of nonrefundable fees. In contrast, state regulators urged the Board to tighten the fee restriction, noting that allowing the collection of credit report fees will conflict with many state laws.

The Board is adopting the rule regarding the fee restriction as proposed. Consumers typically pay fees to apply for a mortgage loan, such as fees for a credit report, a property appraisal, or an interest rate lock, as well as general ''application'' fees to process the loan. If the fees are significant, as they often are for appraisals and for extended rate locks, consumers may feel constrained from shopping for alternative loans because they feel financially committed to the transaction. This risk is particularly high in the subprime market, where consumers often are cash-strapped and where limited price transparency may obscure the benefits of shopping for mortgage loans, as discussed in more detail in part II. The risk also applies to the prime market, where many consumers would find a fee of several hundred dollars, such as the fee often imposed for an appraisal and other services, to be costly enough to deter them from shopping further among alternative loans and sources. Limiting the fee restriction to nonrefundable fees also would likely undermine the intent of the rule. Consumers, especially those in the subprime market, may not have sufficient cash to pay ''refundable fees'' to multiple creditors, and therefore would be discouraged from shopping or otherwise unable to obtain multiple early mortgage loan disclosures to compare credit terms.

In addition, the definition of ''business day'' under § 226.2(a)(6) is being revised for purposes of the consumer's receipt of early mortgage loan disclosures under § 226.19(a)(1)(ii). Existing § 226.2(a)(6) contains two definitions of ''business day.'' Under the standard definition, a business day means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However, for purposes of rescission under §§ 226.15 and 226.23, and for purposes of

[126] *See, e.g., Nontraditional Mortgage Guidance.*

§ 226.31, a ''business day'' means all calendar days except Sundays and specified legal public holidays. The definition of ''business day'' is being revised to apply the second definition of business day to the consumer's receipt of early mortgage loan disclosures under § 226.19(a)(1)(ii). The Board believes that the definition of business day that excludes Sundays and legal public holidays is more appropriate because consumers should not be presumed to have received disclosures in the mail on a day on which there is no mail delivery.

Under the final rule, creditors may presume that the consumer receives the early mortgage loan disclosure three business days after mailing. For example, a creditor that puts the early mortgage loan disclosure in the mail on a Friday can presume that the consumer receives such disclosure the following Tuesday, and impose appraisal, rate-lock and other application fees after midnight on Tuesday (assuming there are no intervening legal public holidays). The Board does not believe that the rule delaying the collection of fees will have a significant negative impact on the mortgage loan application and approval process. Three business days sets an appropriate timeframe for the consumer to receive and review the early mortgage loan disclosure. It is not always practical for a creditor to know when a consumer will actually receive the early mortgage loan disclosure. Creditors can choose among many different methods to deliver the disclosures to consumers, such as by overnight delivery service, e-mail or regular postal mail. In most instances consumers will receive the early mortgage loan disclosure within three business days, and the Board notes that it is common industry practice to deliver mortgage disclosures by overnight courier.

The Board contemplated providing a longer timeframe for the presumption of receipt of the early mortgage loan disclosure. Some originators could delay hiring an appraiser until after the consumer pays an appraisal fee, which would delay the appraisal report and the processing time for the application. Some creditors may refuse to lock-in the interest rate until after the consumer pays a rate lock fee, or alternatively lock-in the interest rate and bear some market risk or cost until it can impose a rate lock fee on the consumer. The Board believes the three business day time frame for the fee restriction strikes a proper balance between enabling consumers to review their credit terms before making a financial commitment and maintaining the efficiency of automated and streamlined loan processing.

Presumption of receipt. Proposed § 226.19(a)(1)(ii) provided that a fee may not be imposed until after a consumer has received the early mortgage loan disclosure and that the consumer is presumed to receive the disclosure three business days after it is mailed. Proposed comment 19(a)(1)(ii)–1 clarified further that creditors may charge a consumer a fee, in all cases, after midnight of the third business day following mailing the disclosure, and for disclosures delivered in person, fees may be charged anytime after delivery.

One commenter addressed the receipt of disclosures sent by mail and suggested that the Board consider: (1) A presumption that disclosures sent by overnight courier are received by the consumer the next day; and (2) a presumption that disclosures delivered by electronic communication in compliance with applicable requirements under the Electronic Signatures in Global and National Commerce Act (''E–Sign Act''), 15 U.S.C. 7001 *et seq.,* are received by the consumer immediately.

The Board considered but is not adopting rules for overnight courier and other delivery methods. For example, overnight courier companies do not appear to adhere to one generally accepted definition for ''overnight delivery''; it may mean next business day or next calendar day. Recognized holidays and business hours also affect what is considered overnight delivery. In light of these variations the Board believes it is not feasible to define with sufficient clarity what may be considered acceptable ''overnight delivery'' or to delineate a presumption of receipt for all available methods of delivery.

In addition, although the final rule provides a presumption of receipt if the early mortgage loan disclosure is delivered by mail, it does not prevent creditors from choosing any permissible method available to deliver the early mortgage loan disclosure, such as overnight courier or e-mail if in compliance with the E–Sign Act. Creditors may impose such fees any time after the consumer actually receives the early mortgage loan disclosure. Evidence of receipt by the consumer, such as documentation that the mortgage loan disclosure was delivered by certified mail, overnight delivery, or e-mail (if similar documentation is available), is sufficient to establish compliance with § 226.19(a)(1)(ii).

Exception to fee restriction. Proposed § 226.19(a)(1)(iii) provided that a fee for obtaining the consumer's credit history may be charged before the consumer receives the early mortgage loan disclosure, provided the fee is ''*bona fide* and reasonable in amount.'' Many creditors and their trade associations noted that different pricing schedules make it difficult to ascertain the exact cost of a credit report and urged the Board to allow creditors to charge a flat or nominal fee for the credit report.

The Board is adopting § 226.19(a)(1)(iii) as proposed. The final rule recognizes that creditors generally cannot provide accurate transaction-specific cost estimates without having considered the consumer's credit history. Requiring creditors to bear the cost of reviewing credit history with little assurance the consumer will apply for a loan would be unduly burdensome. Some creditors might forego obtaining the consumer's credit history; disclosures made without any credit risk assessment of the consumer are likely to be of little value to the consumer.

The language ''*bona fide* and reasonable in amount,'' in § 226.19(a)(1)(iii) does not require the creditor to charge the consumer the actual cost incurred by the creditor for that particular credit report, but rather contemplates a reasonable and justifiable fee. Many creditors enter into arrangements where pricing varies based on volume of business or other legitimate business factors, which makes the exact charge imposed on a particular consumer difficult to determine. The Board believes that a fee that bears a reasonable relationship to the actual charge incurred by the creditor is ''*bona fide* and reasonable in amount.''

Enhanced civil remedies and redisclosure. The Board proposed the early mortgage loan disclosure pursuant to its authority under TILA Section 105(a), 15 U.S.C. 1604(a). Consumer advocacy groups generally support the early mortgage loan disclosure, but urged the Board to allow for civil enforcement to ensure compliance. They argued that without enhanced remedies, the disclosures could become instruments for ''bait and switch'' schemes. Specifically, consumer groups urged the Board to use its authority under TILA Section 129(l)(2), 15 U.S.C. 1639(l)(2), in addition to Section 105(a), and declare that failure to deliver timely and accurate early disclosures is an unfair and deceptive practice subject to enhanced damages under Section 129(l)(2). Consumer groups also argued that the early mortgage loan disclosure should be considered a material disclosure subject to remedies available under TILA Section 130(a)(4), 15 U.S.C. 1640(a)(4) and extended rescission rights.

The Board is adopting the final rule as proposed, pursuant to its authority under TILA Section 105(a), 15 U.S.C. 1604(a). The early mortgage loan disclosure is an early good faith estimate of transaction-specific terms, such as the APR and payment schedule. Although the Board shares commenters' concerns about bait and switch tactics, responsible creditors may not know the precise credit terms to disclose, and therefore must provide estimates, because the disclosure must be provided before the underwriting process is complete. However, through its review of closed-end mortgage disclosures, the Board may determine that some requirement for accuracy of the early disclosures is feasible.

Consumer groups and others also suggested that the Board require redisclosure of the early mortgage loan disclosure some time period (*e.g.,* at least seven days) before consummation if there have been material changes. They asserted that an inaccurate or misleading early disclosure could cause consumers to stop shopping based on erroneous credit terms. Under current § 226.19(a)(2), redisclosure already is required no later than consummation and industry practice is to give the consumer a final TILA at closing, which does not facilitate shopping. The final rule does not revise the requirements for redisclosure prior to consummation. The Board may consider the need for additional rules as part of its overall review of closed-end mortgage disclosures.

B. Plans To Improve Disclosure

Most creditors and their trade associations, citing the HUD's current RESPA proposal and the 1998 Federal Reserve Board and HUD Joint Report to the Congress Concerning Reform to TILA and RESPA, urged the Board to delay the proposed early mortgage loan disclosure rule and make it part of broader disclosure reform, or at least part of the comprehensive review of Regulation Z's closed-end rules that the Board is conducting currently.

The Board believes that better information in the mortgage market can improve competition and help consumers make better decisions. The final rule is designed, in part, to prevent incomplete or misleading mortgage loan advertisements and solicitations, and to require creditors to provide mortgage disclosures earlier so that consumers can get the information they need when it is most useful to them. The Board recognizes that the content and format of these required early mortgage loan disclosures may need to be updated to reflect the increased complexity of mortgage products. The Board is reviewing current TILA mortgage disclosures and potential revisions to these disclosures through consumer testing. The Board expects that this testing will identify potential improvements for the Board to propose for public comment in a separate rulemaking. In addition, the Board will continue to have discussions with HUD to improve mortgage disclosures.

XIII. Mandatory Compliance Dates

Under TILA Section 105(d), certain of the Board's disclosure regulations are to have an effective date of that October 1 which follows by at least six months the date of promulgation. 15 U.S.C. 1604(d). However, the Board may, at its discretion, lengthen the implementation period for creditors to adjust their forms to accommodate new requirements, or shorten the period where the Board finds that such action is necessary to prevent unfair or deceptive disclosure practices. No similar effective date requirement exists for non-disclosure regulations.

The Board requested comment on whether six months would be an appropriate implementation period, and on the length of time necessary for creditors to implement the proposed rules, as well as whether the Board should specify a shorter implementation period for certain provisions to prevent unfair or deceptive practices. Three organizations of state consumer credit regulators who jointly commented suggested that some of the proposed revisions could be enacted quickly without any burden to creditors, and requested implementation as soon as possible. Many industry commenters and their trade associations stated that although six months is an appropriate time period to implement some parts of the rule, creditors would need additional time to make system enhancements and to implement compliance training for other parts of the rule. For example, they stated that extra time is needed to establish systems to identify loans at or above the APR trigger for higher-priced mortgage loans. Most commenters who addressed the effective date specifically requested a compliance period longer than six months for the proposed early mortgage loan disclosure requirement and the proposed escrow requirement. In light of these concerns, the Board believes additional compliance time beyond six months is appropriate. Therefore, compliance with the final rule will be mandatory as specified below.

Early TILA Disclosures

Pursuant to Section 105(d), the requirement to provide consumers with transaction-specific mortgage loan disclosures under § 226.19 applies to all applications received on or after October 1, 2009. Although state regulators noted that some creditors already have systems in place to provide early mortgage loan disclosures to comply with state law requirements, creditors and their trade groups generally urged the Board to allow more lead time than six months to comply to provide sufficient time for system re-programming, testing, procedural changes, and staff training.

The early mortgage disclosure rule is triggered by the date of receipt of a consumer's written application, and therefore all written applications received by creditors on or after October 1, 2009 must comply with § 226.19. Existing comment 19(a)(1)–3 (redesignated as comment 19(a)(1)(i)–3) states that a written application is deemed received when it reaches the creditor in any of the ways applications are normally transmitted, such as mail, hand delivery or through a broker.

For example, a creditor that receives a consumer's written application for a mortgage refinancing on September 30, 2009, and which is consummated on October 29, 2009, does not need to deliver an early mortgage loan disclosure to the consumer and otherwise comply with the fee restriction requirements of this rule. A creditor that receives a consumer's written application on October 1, 2009 must deliver to the consumer an early mortgage loan disclosure within three business days and before the consumer pays a fee to any person, other than a fee for obtaining the consumer's credit history. The creditor may impose a fee on the consumer, such as for an appraisal or underwriting, after the consumer receives the disclosure. Under § 226.19(a)(1)(ii) the consumer is presumed to have received the early mortgage loan disclosure three business days after it is mailed, and therefore, the creditor may impose a fee after midnight on the third business day following mailing.

Escrow Rules

As described in part IX.D, although many creditors currently provide for escrows, large creditor commenters and their trade associations requested that this provision be delayed by 12 to 24 months to allow creditors that currently have no escrowing capacity or infrastructure to implement the necessary systems and processes.

Manufactured housing industry commenters were particularly concerned because, as described in Part IX.D, currently a limited infrastructure is in place for escrowing on manufactured housing loans. Accordingly, the requirement to establish an escrow account for taxes and insurance (§ 226.35(b)(3)) for higher-priced mortgage loans is effective for such loans for which creditors receive applications on or after April 1, 2010. For higher-priced mortgage loans secured by manufactured housing, however, compliance is mandatory for such loans for which creditors receive applications on or after October 1, 2010.

Advertising Rules and Other Rules Adopted Under TILA Section 129(l)(2)

The final advertising rules are effective for advertisements occurring on or after October 1, 2009. For example, the advertising rules would be applicable to radio advertisements broadcast on or after October 1, 2009, or for solicitations mailed on or after October 1, 2009. The servicing rules are effective for any loans serviced on or after October 1, 2009, whether the servicer obtained servicing rights on the loan before or after that date. The remaining rules are effective for loans for which a creditor receives an application on or after October 1, 2009.

Application of Mandatory Compliance Dates; Pre-Existing Obligations

As described above, the final rule is prospective in application. Sometimes a change in the terms of an existing obligation constitutes a refinancing, which is a new transaction requiring new disclosures. An assumption, where the creditor agrees in writing to accept a subsequent consumer as a primary obligor, is also treated as a new transaction. *See* 12 CFR 226.20(a) and (b). A refinancing or assumption is covered by a provision of the final rule if the transaction occurs on or after that provision's effective date. For example, if a creditor receives an application for a refinancing on or after October 1, 2009, and the refinancing is consummated on October 15, 2009, the provision restricting prepayment penalties in § 226.35(b)(2) applies, but the escrow requirement in § 226.35(b)(3) would not apply because the escrow provision is only effective for new transactions where the application is received on or after April 1, 2010 (or October 1, 2010 for manufactured housing-secured loans). However, if a modification of an existing obligation's terms that does not constitute a refinancing under § 226.20(a) occurs on October 15, 2009, the restriction on prepayment penalties would not apply. Nevertheless, the loan servicing rules in § 226.36(c) will apply to loan servicers as of October 1, 2009, regardless of when the creditor received the application or consummated the transaction.

XIV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 app. A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this final rulemaking is found in 12 CFR part 226. The Board may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0199.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 *et seq.*). The respondents/recordkeepers are creditors and other entities subject to Regulation Z, including for-profit financial institutions and small businesses. Since the Board does not collect any information, no issue of confidentiality normally arises. However, in the event the Board were to retain records during the course of an examination, the information may be protected from disclosure under the exemptions (b)(4), (6), and (8) of the Freedom of Information Act (5 U.S.C. 522(b)).

TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. For open-end credit, creditors are required, among other things, to disclose information about the initial costs and terms and to provide periodic statements of account activity, notices of changes in terms, and statements of rights concerning billing error procedures. Regulation Z requires specific types of disclosures for credit and charge card accounts and home-equity plans. For closed-end loans, such as mortgage and installment loans, cost disclosures are required to be provided prior to consummation. Special disclosures are required in connection with certain products, such as reverse mortgages, certain variable-rate loans, and certain mortgages with rates and fees above specified thresholds. TILA and Regulation Z also contain rules concerning credit advertising. Creditors are required to retain evidence of compliance for 24 months, 12 CFR 226.25, but Regulation Z does not specify the types of records that must be retained.

Under the PRA, the Board accounts for the paperwork burden associated with Regulation Z for the state member banks and other creditors supervised by the Board that engage in lending covered by Regulation Z and, therefore, are respondents under the PRA. Appendix I of Regulation Z defines the Federal Reserve-regulated institutions as: State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden on other creditors. Paperwork burden associated with entities that are not creditors will be accounted for by other federal agencies. To ease the burden and cost of complying with Regulation Z (particularly for small entities), the Board provides model forms, which are appended to the regulation.

As mentioned in the Preamble, on January 9, 2008, a notice of proposed rulemaking (NPR) was published in the **Federal Register** (73 FR 1672). The comment period for this notice expired on April 8, 2008. No comments specifically addressing the burden estimate were received; therefore, the burden estimates will remain unchanged as published in the NPR. The final rule will impose a one-time increase in the total annual burden under Regulation Z by 46,880 hours from 552,398 to 599,278 hours. This burden increase will be imposed on all Federal Reserve-regulated institutions that are deemed to be respondents for the purposes of the PRA. Note that these burden estimates do not include the burden addressing changes to format, timing, and content requirements for the five main types of open-end credit disclosures governed by Regulation Z as announced in a separate proposed rulemaking (Docket No. R–1286).

The Board has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100–0199), Washington, DC 20503.

XV. Regulatory Flexibility Analysis

In accordance with section 4 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, the Board is publishing a final regulatory flexibility analysis for the proposed amendments to Regulation Z. The RFA requires an agency either to provide a final regulatory flexibility analysis with a final rule or certify that the final rule will not have a significant economic impact on a substantial number of small entities. An entity is considered ''small'' if it has $165 million or less in assets for banks and other depository institutions; and $6.5 million or less in revenues for non-bank mortgage lenders, mortgage brokers, and loan servicers.[127]

The Board received a large number of comments contending that the proposed rule would have a significant impact on various businesses. In addition, the Board received one comment on its initial regulatory flexibility analysis. Based on public comment, the Board's own analysis, and for the reasons stated below, the Board believes that this final rule will have a significant economic impact on a substantial number of small entities.

1. Statement of the Need for, and Objectives of, the Final Rule

The Board is publishing final rules to establish new regulatory protections for consumers in the residential mortgage market through amendments to Regulation Z, which implements TILA and HOEPA. As stated more fully above, the amendments are intended to protect consumers in the mortgage market from unfair, abusive, or deceptive lending and servicing acts or practices while preserving responsible lending and sustainable homeownership. Some of the restrictions apply to only higher-priced mortgage loans, while others apply to all mortgage loans secured by a consumer's principal dwelling. For example, for higher-priced mortgage loans, the amendments prohibit lending based on the collateral without regard to consumers' ability to repay their obligations from income, or from other sources besides the collateral. In addition, the amendments' goals are to ensure that advertisements for mortgage credit provide accurate and balanced information and do not contain misleading or deceptive representations; and to provide consumers transaction-specific disclosures early enough to use while shopping for a mortgage.

[127] U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

2. Summary of Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

In accordance with section 3(a) of the RFA, 5 U.S.C 603(a), the Board prepared an initial regulatory flexibility analysis (IRFA) in connection with the proposed rule, and acknowledged that the projected reporting, recordkeeping, and other compliance requirements of the proposed rule would have a significant economic impact on a substantial number of small entities. In addition, the Board recognized that the precise compliance costs would be difficult to ascertain because they would depend on a number of unknown factors, including, among other things, the specifications of the current systems used by small entities to prepare and provide disclosures and/or solicitations and to administer and maintain accounts, the complexity of the terms of credit products that they offer, and the range of such product offerings. The Board sought information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small entities. The Board recognizes that businesses often pass compliance costs on to consumers and that a less costly rule could benefit both small business and consumers.

The Board reviewed comments submitted by various entities in order to ascertain the economic impact of the proposed rule on small entities. A number of financial institutions and mortgage brokers expressed concern that the Board had underestimated the costs of compliance. In addition, the Office of Advocacy of the U.S. Small Business Administration (Advocacy) submitted a comment on the Board's IRFA. Executive Order 13272 directs Federal agencies to respond in a final rule to written comments submitted by Advocacy on a proposed rule, unless the agency certifies that the public interest is not served by doing so. The Board's response to Advocacy's comment letter is below.

Response to U.S. Small Business Administration comment. Advocacy supported the consumer protection goals in the proposed rule, but expressed concern that the Board's IRFA did not adequately assess the impact of the proposed rule on small entities as required by the RFA. Advocacy urged the Board to issue a new proposal containing a revised IRFA. For the reasons stated below, the Board believes that its IRFA complied with the requirements of the RFA and the Board is proceeding with a final rule.

Advocacy suggested that the Board failed to provide sufficient information about the economic impact of the proposed rule and that the Board's request for public comment on the costs to small entities of the proposed rule was not appropriate. Section 3(a) of the RFA requires agencies to publish for comment an IRFA which shall describe the impact of the proposed rule on small entities. 5 U.S.C 603(a). In addition, section 3(b) requires the IRFA to contain certain information including a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record. 5 U.S.C. 603(b).

The Board's IRFA complied with the requirements of the RFA. First, the Board described the impact of the proposed rule on small entities by describing the rule's proposed requirements in detail throughout the supplementary information for the proposed rule. Second, the Board described the projected compliance requirements of the rule in its IRFA, noting the need for small entities to update systems, disclosures and underwriting practices.[128] The RFA does not require the Board to undertake an exhaustive economic analysis of the proposal's impact on small entities in the IRFA. Instead, the IRFA procedure is intended to evoke commentary from small businesses about the effect of the rule on their activities, and to require agencies to consider the effect of a regulation on those entities. *Cement Kiln Recycling Coalition* v. *EPA*, 255 F.3d 855, 868 (D.C. Cir. 2001). The Board described the projected impact of the proposed rule and sought comments from small entities themselves on the effect the proposed rule would have on their activities. The Board also notes that the final rule does not adopt the proposed rule on creditor payments to mortgage brokers, reducing the final rule's impact on small mortgage broker entities.

Advocacy also commented that the Board failed to provide sufficient information about the number of small mortgage brokers that may be impacted by the rule. Section 3(b)(3) of the RFA requires the IRFA to contain a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply. 5 U.S.C. 603(b)(3) (emphasis added). The Board provided a description of the

[128] 73 FR 1672, 1720 (Jan. 9, 2008).

small entities to which the proposed rule would apply and provided an estimate of the number of small depository institutions to which the proposed rule would apply.[129] The Board also provided an estimate of the total number of mortgage broker entities and estimated that most of these were small entities.[130] The Board stated that it was not aware of a reliable source for the total number of small entities likely to be affected by the proposal.[131] Thus, the Board did not find it feasible to estimate their number.

Advocacy also suggested that the Board's IRFA did not sufficiently address alternatives to the proposed rule. Section 3(c) of the RFA requires that an IRFA contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. 603(c). The Board's IRFA discusses the alternative of improved disclosures and requests comment on other alternatives. Advocacy commented that the Board's IRFA does not discuss the economic impact that the disclosure alternative would have on small entities. Yet the Board's IRFA discussion of the disclosure alternative indicates that the Board does not believe that the disclosure alternative would accomplish the stated objectives of applicable statutes.[132] Advocacy also suggested that the Board did not discuss other alternatives such as a later implementation date. However, the Board specifically discussed and requested comment on the effective date in another section of the supplementary information to the proposed rule.[133] Section 5(a) of the RFA permits an agency to perform the IRFA analysis (among others) in conjunction with or as part of any other analysis required by any other law if such other analysis satisfies the provisions of the RFA. 5 U.S.C. 605(a). Other alternatives were discussed throughout the supplementary information to the Board's proposal.

Other comments. In addition to Advocacy's comment letter, a number of industry commenters expressed concerns that the rule, as proposed, would be costly to implement, would not provide enough flexibility, and would not adequately respond to the needs or nature of their business. Many commenters argued that improved disclosures could protect consumers against unfair acts or practices in connection with closed-end mortgage loans secured by a consumer's principal dwelling as well as the proposed rule. As discussed in part XII, while the Board anticipates proposing improvements to mortgage loan disclosures, the Board believes that better disclosures alone would not adequately address unfair, abusive or deceptive practices in the mortgage market, including the subprime market. Since improved disclosures alone would fail to accomplish the stated objectives of TILA Section 129(l)(2), which authorizes the Board to prohibit unfair or deceptive practices in connection with mortgage loans, the Board concluded that improved disclosures alone do not represent a significant alternative to the proposed rule, as a result of which the IRFA did not discuss the economic impact of improved disclosures.

Many of the issues raised by commenters do not apply uniquely to small entities and are addressed above in other parts of the **SUPPLEMENTARY INFORMATION**. The comments that expressed specific concerns about the effect of the proposed rule on small entities are discussed below.

Defining loans as higher-priced. The proposed rule defined higher-priced mortgage loans as loans with an APR that exceeds the comparable Treasury security by three or more percentage points for first-lien loans, or five or more percentage points for subordinate-lien loans. Some small banks, community banks and manufactured housing representatives expressed concerns that, based on the proposed definition of higher-priced mortgage loans, some prime loans may be classified as higher-priced, which could have negative impact on their business. Many of these commenters proposed changing the definition of higher-priced mortgage loans, and manufactured housing industry representatives proposed a separate standard for personal property loans on manufactured homes.

As discussed above, the Board is adopting a definition of ''higher-priced mortgage loan'' that is similar in concept to the definition proposed, but different in the particulars. The final definition, like the proposed definition, sets a threshold above a market rate to distinguish higher-priced mortgage loans from the rest of the mortgage market. Instead of yields on Treasury securities, the definition in the final rule uses a survey-based estimate of market rates for the lowest-risk prime mortgages, referred to as the average prime offer rate. The Board believes that the final rule will more effectively meet both goals of covering prime loans and excluding prime, though it will cover some prime loans under certain market conditions.

Escrows. The proposed rule would require creditors to establish escrow accounts for taxes and insurance and permitted them to allow borrowers to opt out of escrows 12 months after loan consummation. Several industry commenters noted that the compliance with the escrow proposal would be costly and many small banks and community banks commented that they do not currently require escrows because of this cost. A few small lenders commented that the costs of setting up escrow accounts are prohibitively expensive but did not disclose what such costs are. Manufactured housing industry commenters were especially concerned about the cost of requiring escrows for manufactured homes that are taxed as personal property because there is no unified, systematic process for the collection of personal property taxes among various government entities.

The final rule is adopted substantially as proposed. As discussed above, the Board does not believe that alternatives to the final rule would achieve HOEPA's objectives. The Board has, however, chosen effective dates for the final rule that give creditors a longer implementation period for establishing escrow accounts. Comments on the effective dates of the final rule are discussed below.

Broker disclosures. The Board proposed to prohibit creditors from paying a mortgage broker more than the consumer had agreed in advance that the broker would receive. A large number of mortgage brokers commented that the proposal could lead to brokers being less competitive in the marketplace and may result in some small brokers exiting the marketplace.

The Board tested the proposal in several dozen one-on-one interviews with a diverse group of consumers. On the basis of this testing and other information, the Board is withdrawing its proposal to prohibit creditors from paying a mortgage broker more than the

[129] *Id.* at 1719.

[130] *Id.* at 1720. According to the National Association of Mortgage Brokers, in 2004 there were 53,000 mortgage brokerage companies that employed an estimated 418,700 people. The Board believes that most of these companies are small entities. In its comment letter, Advocacy noted that the appropriate SBA size standard for mortgage brokers is $6.5 million in average annual receipts and that, of 15,590 mortgage broker firms in the U.S. according to the 2002 Economic Census data, 15,195 would be classified as small using the $6.5 million standard.

[131] 73 FR 1672, 1719 (Jan. 9, 2008).

[132] *Id.* at 1720.

[133] *Id.* at 1717.

consumer had agreed in advance that the broker would receive. The Board is concerned that the proposed agreement and disclosures would confuse consumers and undermine their decision making rather than improve it. The Board will continue to explore available options to address potentially unfair acts or practices associated with originator compensation arrangements such as yield spread premiums.

Servicing. The proposed rule prohibited mortgage servicers from ''pyramiding'' late fees, failing to credit payments as of the date of receipt, failing to provide loan payoff statements upon request within a reasonable time, or failing to deliver a fee schedule to a consumer upon request. Several commenters noted that the fee schedule disclosures would be very costly for a servicer since fees vary by state, county, city, investor and even product. The Board has considered the concerns raised by commenters and has concluded that the transparency benefit of the schedule does not sufficiently offset the burdens of producing such a schedule. Thus, the Board is not adopting the proposed fee schedule disclosure.

Early disclosures. The proposed rule would require creditors to give consumers transaction-specific, early mortgage loan disclosures for certain closed-end loans secured by a consumer's principal dwelling. The proposed rule would require creditors to deliver this disclosure within three business days of application and before a consumer pays a fee to any person, other than a fee for obtaining the consumer's credit report. Many creditors and their trade associations opposed the proposal due to operational cost and compliance difficulties (for example, system reprogramming, testing, procedural changes, and staff training). They noted that the burden may be significant for some small entity creditors, such as community banks.

The Board is adopting § 226.19(a)(1)(iii) substantially as proposed. The Board believes that alternatives to the final rule would not achieve TILA's objectives. However, as discussed below, the Board has chosen an implementation period for the final rule that responds to creditors' concerns about the time required to comply with the rule.

Effective date. The Board requested comment on whether six months would be an appropriate implementation period, and on the length of time necessary for creditors to implement the proposed rules, as well as whether the Board should specify a shorter implementation period for certain provisions in order to prevent unfair or deceptive practices.

Many industry commenters and their trade associations stated that six months would be an appropriate implementation period for some parts of the rule, but that they would need additional time to implement the proposed early mortgage loan disclosure requirement and the proposed escrow requirement. Commenters requested additional time to implement the early mortgage loan disclosure rule in order to provide sufficient time for system re-programming, testing, procedural changes, and staff training. And, although many creditors currently provide for escrows, other creditors, including many that are small entities, currently have no escrowing capacity or infrastructure. These commenters requested a period of 12 to 24 months to implement the necessary systems and processes. Manufactured housing industry commenters were particularly concerned because a limited infrastructure is in place for escrowing on manufactured housing loans.

In light of these concerns, the Board believes additional compliance time beyond six months is appropriate. With two exceptions, the final rule is effective for loans consummated on or after October 1, 2009. The requirement to establish an escrow account for taxes and insurance for higher-priced mortgage loans is effective for loans consummated on or after April 1, 2010, or, for loans secured by manufactured housing, consummated on or after October 1, 2010.

3. Description and Estimate of Small Entities To Which the Proposed Rule Would Apply

The final rule applies to all institutions and entities that engage in closed-end home-secured lending and servicing. The Board acknowledged in its IRFA the lack of a reliable source for the total number of small entities likely to be affected by the proposal, since the credit provisions of TILA and Regulation Z have broad applicability to individuals and businesses that originate, extend and service even small numbers of home-secured credit.

Through data from Reports of Condition and Income (''call reports''), the Board identified approximate numbers of small depository institutions that would be subject to the proposed rules. Based on March 2008 call report data, approximately 8,393 small institutions would be subject to the final rule. Approximately 17,101 depository institutions in the United States filed call report data, approximately 12,237 of which had total domestic assets of $165 million or less and thus were considered small entities for purposes of the RFA. Of 4,554 banks, 401 thrifts and 7,318 credit unions that filed call report data and were considered small entities, 4,259 banks, 377 thrifts, and 3,757 credit unions, totaling 8,393 institutions, extended mortgage credit. For purposes of this analysis, thrifts include savings banks, savings and loan entities, co-operative banks and industrial banks.

In its IRFA, the Board recognized that it could not identify with certainty the number of small nondepository institutions that would be subject to the proposed rule. Home Mortgage Disclosure Act (HMDA) data indicate that 2,004 non-depository institutions filed HMDA reports in 2006. Based on the small volume of lending activity reported by these institutions, most are likely to be small.

Certain parts of the final rule would apply to mortgage brokers. The Board provided an estimate of the number of mortgage brokers in its IRFA, citing data from the National Association of Mortgage Brokers indicating that in 2004 there were 53,000 mortgage brokerage companies.[134] The Board estimated in the IRFA that most of these companies are small entities. A comment letter received by the U.S. Small Business Administration, citing the 2002 Economic Census, stated that there were 15,195 small mortgage broker entities.

Certain parts of the final rule would also apply to mortgage servicers. As noted in IRFA, the Board is not aware, however, of a source of data for the number of small mortgage servicers. The available data are not sufficient for the Board to realistically estimate the number of mortgage servicers that would be subject to the final rule and that are small as defined by the U.S. Small Business Administration.

4. Reporting, Recordkeeping, and Other Compliance Requirements

The compliance requirements of the final rule are described in the **SUPPLEMENTARY INFORMATION.** Some small entities will be required, among other things, to modify their underwriting practices and home-secured credit disclosures to comply with the revised rules. The precise costs to small entities of updating their systems, disclosures, and underwriting practices are difficult to predict. These costs will depend on a number of unknown factors, including, among other things, the specifications of the

[134] *http://www.namb.org/namb/Industry_Facts.asp?SnID=719224934.*

current systems used by such entities to prepare and provide disclosures and/or solicitations and to administer and maintain accounts, the complexity of the terms of credit products that they offer, and the range of such product offerings. For some small entities, certain parts of the rule may require the type of professional skills already necessary to meet other legal requirements. For example, the Board believes that final rule's requirements with regard to advertising will require the same types of professional skills and recordkeeping procedures that are needed to comply with existing TILA and Regulation Z advertising rules. Other parts of the rule may require new professional skills and recordkeeping procedures for some small entities. For example, creditors that do not currently offer escrow accounts will need to implement that capability. The Board believes that costs of the final rule as a whole will have a significant economic effect on small entities.

5. Steps Taken To Minimize the Economic Impact On Small Entities

The steps the Board has taken to minimize the economic impact and compliance burden on small entities, including the factual, policy, and legal reasons for selecting the alternatives adopted and why each one of the other significant alternatives was not accepted, are described above in the **SUPPLEMENTARY INFORMATION** and in the summary of issues raised by the public comments in response to the proposal's IRFA. The final rule's modifications from the proposed rule that minimize economic impact on small entities are summarized below.

First, the Board has provided a different standard for defining higher-priced mortgage loans to more accurately correspond to mortgage market conditions and exclude from the definition some prime loans that might have been classified as higher-priced under the proposed rule. The Board believes that this will decrease the economic impact of the final rule on small entities by limiting their compliance costs for prime loans the Board does not intend to cover under the higher-priced mortgage loan rules.

Second, the Board is providing an implementation period that responds to commenters' concerns about the time needed to comply with the final rule. The Board is also providing later effective dates for the escrow requirement than for the other parts of the final rule. As discussed above, the Board believes that these effective dates will decrease costs for small entities by providing them with sufficient time to come into compliance with the final rule's requirements.

The Board also notes that it is withdrawing two proposed rules for which small entity commenters expressed concern about the costs of compliance. The Board is withdrawing its proposal to prohibit creditors from paying a mortgage broker more than the consumer had agreed in advance that the broker would receive, and its proposal to require a servicer to provide to a consumer upon request a schedule of all specific fees and charges that may be imposed in connection with the servicing of the consumer's account.

The Board believes that these changes minimize the significant economic impact on small entities while still meeting the stated objectives of HOEPA and TILA.

List of Subjects in 12 CFR Part 226

Advertising, Consumer protection, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 226 is amended to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), and 1639(l).

Subpart A—General

■ 2. Section 226.1 is amended by revising paragraph (d)(5) to read as follows:

§ 226.1 Authority, purpose, coverage, organization, enforcement and liability.

* * * * *

(d) * * *

* * * * *

(5) Subpart E contains special rules for mortgage transactions. Section 226.32 requires certain disclosures and provides limitations for loans that have rates and fees above specified amounts. Section 226.33 requires disclosures, including the total annual loan cost rate, for reverse mortgage transactions. Section 226.34 prohibits specific acts and practices in connection with mortgage transactions that are subject to § 226.32. Section 226.35 prohibits specific acts and practices in connection with higher-priced mortgage loans, as defined in § 226.35(a). Section 226.36 prohibits specific acts and practices in connection with credit secured by a consumer's principal dwelling.

* * * * *

■ 3. Section 226.2 is amended by revising paragraph (a)(6) to read as follows:

§ 226.2 Definitions and Rules of Construction.

(a) * * *

(6) *''Business Day''* means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However, for purposes of rescission under §§ 226.15 and 226.23, and for purposes of § 226.19(a)(1)(ii) and § 226.31, the term means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

Subpart B—Open-End Credit

■ 4. Section 226.16 is amended by revising paragraphs (d)(2) through (d)(4), and adding new paragraphs (d)(6) and (e) to read as follows:

§ 226.16 Advertising.

* * * * *

(d) *Additional requirements for home-equity plans*

* * * * *

(2) *Discounted and premium rates.* If an advertisement states an initial annual percentage rate that is not based on the index and margin used to make later rate adjustments in a variable-rate plan, the advertisement also shall state with equal prominence and in close proximity to the initial rate:

(i) The period of time such initial rate will be in effect; and

(ii) A reasonably current annual percentage rate that would have been in effect using the index and margin.

(3) *Balloon payment.* If an advertisement contains a statement of any minimum periodic payment and a balloon payment may result if only the minimum periodic payments are made, even if such a payment is uncertain or unlikely, the advertisement also shall state with equal prominence and in close proximity to the minimum periodic payment statement that a balloon payment may result, if applicable.[36e] A balloon payment results if paying the minimum periodic payments does not fully amortize the outstanding balance by a specified date

[36e] [Reserved.]

or time, and the consumer is required to repay the entire outstanding balance at such time. If a balloon payment will occur when the consumer makes only the minimum payments required under the plan, an advertisement for such a program which contains any statement of any minimum periodic payment shall also state with equal prominence and in close proximity to the minimum periodic payment statement:

(i) That a balloon payment will result; and

(ii) The amount and timing of the balloon payment that will result if the consumer makes only the minimum payments for the maximum period of time that the consumer is permitted to make such payments.

(4) *Tax implications.* An advertisement that states that any interest expense incurred under the home-equity plan is or may be tax deductible may not be misleading in this regard. If an advertisement distributed in paper form or through the Internet (rather than by radio or television) is for a home-equity plan secured by the consumer's principal dwelling, and the advertisement states that the advertised extension of credit may exceed the fair market value of the dwelling, the advertisement shall clearly and conspicuously state that:

(i) The interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(ii) The consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

* * * * *

(6) *Promotional rates and payments*—(i) *Definitions.* The following definitions apply for purposes of paragraph (d)(6) of this section:

(A) *Promotional rate.* The term ''promotional rate'' means, in a variable-rate plan, any annual percentage rate that is not based on the index and margin that will be used to make rate adjustments under the plan, if that rate is less than a reasonably current annual percentage rate that would be in effect under the index and margin that will be used to make rate adjustments under the plan.

(B) *Promotional payment.* The term ''promotional payment'' means—

(*1*) For a variable-rate plan, any minimum payment applicable for a promotional period that:

(*i*) Is not derived by applying the index and margin to the outstanding balance when such index and margin will be used to determine other minimum payments under the plan; and

(*ii*) Is less than other minimum payments under the plan derived by applying a reasonably current index and margin that will be used to determine the amount of such payments, given an assumed balance.

(*2*) For a plan other than a variable-rate plan, any minimum payment applicable for a promotional period if that payment is less than other payments required under the plan given an assumed balance.

(C) *Promotional period.* A ''promotional period'' means a period of time, less than the full term of the loan, that the promotional rate or promotional payment may be applicable.

(ii) *Stating the promotional period and post-promotional rate or payments.* If any annual percentage rate that may be applied to a plan is a promotional rate, or if any payment applicable to a plan is a promotional payment, the following must be disclosed in any advertisement, other than television or radio advertisements, in a clear and conspicuous manner with equal prominence and in close proximity to each listing of the promotional rate or payment:

(A) The period of time during which the promotional rate or promotional payment will apply;

(B) In the case of a promotional rate, any annual percentage rate that will apply under the plan. If such rate is variable, the annual percentage rate must be disclosed in accordance with the accuracy standards in §§ 226.5b, or 226.16(b)(1)(ii) as applicable; and

(C) In the case of a promotional payment, the amounts and time periods of any payments that will apply under the plan. In variable-rate transactions, payments that will be determined based on application of an index and margin shall be disclosed based on a reasonably current index and margin.

(iii) *Envelope excluded.* The requirements in paragraph (d)(6)(ii) of this section do not apply to an envelope in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.

(e) *Alternative disclosures—television or radio advertisements.* An advertisement for a home-equity plan subject to the requirements of § 226.5b made through television or radio stating any of the terms requiring additional disclosures under paragraph (b) or (d)(1) of this section may alternatively comply with paragraph (b) or (d)(1) of this section by stating the information required by paragraph (b)(2) of this section or paragraph (d)(1)(ii) of this section, as applicable, and listing a toll-free telephone number, or any telephone number that allows a consumer to reverse the phone charges when calling for information, along with a reference that such number may be used by consumers to obtain additional cost information.

Subpart C—Closed-End Credit

■ 5. Section 226.17 is amended by revising paragraphs (b) and (f) to read as follows:

§ 226.17 General disclosure requirements.

* * * * *

(b) *Time of disclosures.* The creditor shall make disclosures before consummation of the transaction. In certain mortgage transactions, special timing requirements are set forth in § 226.19(a). In certain variable-rate transactions, special timing requirements for variable-rate disclosures are set forth in § 226.19(b) and § 226.20(c). In certain transactions involving mail or telephone orders or a series of sales, the timing of the disclosures may be delayed in accordance with paragraphs (g) and (h) of this section.

* * * * *

(f) *Early disclosures.* If disclosures required by this subpart are given before the date of consummation of a transaction and a subsequent event makes them inaccurate, the creditor shall disclose before consummation (except that, for certain mortgage transactions, § 226.19(a)(2) permits redisclosure no later than consummation or settlement, whichever is later).[39]

* * * * *

■ 6. Section 226.19 is amended by revising the heading and paragraph (a)(1) to read as follows:

§ 226.19 Certain mortgage and variable-rate transactions.

(a) *Mortgage transactions subject to RESPA*—(1)(i) *Time of disclosures.* In a mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) that is secured by the consumer's principal dwelling, other than a home equity line of credit subject to § 226.5b, the creditor shall make good faith estimates of the disclosures required by § 226.18 before consummation, or shall deliver or place them in the mail not later than three business days after the creditor receives the consumer's written application, whichever is earlier.

(ii) *Imposition of fees.* Except as provided in paragraph (a)(1)(iii) of this

[39] [Reserved.]

section, neither a creditor nor any other person may impose a fee on the consumer in connection with the consumer's application for a mortgage transaction subject to paragraph (a)(1)(i) of this section before the consumer has received the disclosures required by paragraph (a)(1)(i) of this section. If the disclosures are mailed to the consumer, the consumer is considered to have received them three business days after they are mailed.

(iii) *Exception to fee restriction.* A creditor or other person may impose a fee for obtaining the consumer's credit history before the consumer has received the disclosures required by paragraph (a)(1)(i) of this section, provided the fee is *bona fide* and reasonable in amount.

* * * * *

■ 7. Section 226.23 is amended by revising footnote 48 to paragraph (a)(3) to read ''The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2).''

■ 8. Section 226.24 is amended by redesignating paragraphs (b) through (d) as paragraphs (c) through (e), respectively, adding new paragraph (b), revising newly designated paragraphs (c) through (e), removing and reserving footnote 49, and adding new paragraphs (f) through (i), to read as follows:

§ 226.24 Advertising.

* * * * *

(b) *Clear and conspicuous standard.* Disclosures required by this section shall be made clearly and conspicuously.

(c) *Advertisement of rate of finance charge.* If an advertisement states a rate of finance charge, it shall state the rate as an ''annual percentage rate,'' using that term. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. If an advertisement is for credit not secured by a dwelling, the advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate. If an advertisement is for credit secured by a dwelling, the advertisement shall not state any other rate, except that a simple annual rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(d) *Advertisement of terms that require additional disclosures*—(1) *Triggering terms.* If any of the following terms is set forth in an advertisement, the advertisement shall meet the requirements of paragraph (d)(2) of this section:

(i) The amount or percentage of any downpayment.

(ii) The number of payments or period of repayment.

(iii) The amount of any payment.

(iv) The amount of any finance charge.

(2) *Additional terms.* An advertisement stating any of the terms in paragraph (d)(1) of this section shall state the following terms,[49] as applicable (an example of one or more typical extensions of credit with a statement of all the terms applicable to each may be used):

(i) The amount or percentage of the downpayment.

(ii) The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.

(iii) The ''annual percentage rate,'' using that term, and, if the rate may be increased after consummation, that fact.

(e) *Catalogs or other multiple-page advertisements; electronic advertisements*—(1) If a catalog or other multiple-page advertisement, or an electronic advertisement (such as an advertisement appearing on an Internet Web site), gives information in a table or schedule in sufficient detail to permit determination of the disclosures required by paragraph (d)(2) of this section, it shall be considered a single advertisement if—

(i) The table or schedule is clearly and conspicuously set forth; and

(ii) Any statement of the credit terms in paragraph (d)(1) of this section appearing anywhere else in the catalog or advertisement clearly refers to the page or location where the table or schedule begins.

(2) A catalog or other multiple-page advertisement or an electronic advertisement (such as an advertisement appearing on an Internet Web site) complies with paragraph (d)(2) of this section if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered.

(f) *Disclosure of Rates and Payments in Advertisements for Credit Secured by a Dwelling.*

(1) *Scope.* The requirements of this paragraph apply to any advertisement for credit secured by a dwelling, other than television or radio advertisements, including promotional materials accompanying applications.

(2) *Disclosure of rates*—(i) *In general.* If an advertisement for credit secured by a dwelling states a simple annual rate of interest and more than one simple annual rate of interest will apply over the term of the advertised loan, the advertisement shall disclose in a clear and conspicuous manner:

(A) Each simple annual rate of interest that will apply. In variable-rate transactions, a rate determined by adding an index and margin shall be disclosed based on a reasonably current index and margin;

(B) The period of time during which each simple annual rate of interest will apply; and

(C) The annual percentage rate for the loan. If such rate is variable, the annual percentage rate shall comply with the accuracy standards in §§ 226.17(c) and 226.22.

(ii) *Clear and conspicuous requirement.* For purposes of paragraph (f)(2)(i) of this section, clearly and conspicuously disclosed means that the required information in paragraphs (f)(2)(i)(A) through (C) shall be disclosed with equal prominence and in close proximity to any advertised rate that triggered the required disclosures. The required information in paragraph (f)(2)(i)(C) may be disclosed with greater prominence than the other information.

(3) *Disclosure of payments*—(i) *In general.* In addition to the requirements of paragraph (c) of this section, if an advertisement for credit secured by a dwelling states the amount of any payment, the advertisement shall disclose in a clear and conspicuous manner:

(A) The amount of each payment that will apply over the term of the loan, including any balloon payment. In variable-rate transactions, payments that will be determined based on the application of the sum of an index and margin shall be disclosed based on a reasonably current index and margin;

(B) The period of time during which each payment will apply; and

(C) In an advertisement for credit secured by a first lien on a dwelling, the fact that the payments do not include amounts for taxes and insurance premiums, if applicable, and that the actual payment obligation will be greater.

(ii) *Clear and conspicuous requirement.* For purposes of paragraph (f)(3)(i) of this section, a clear and conspicuous disclosure means that the

[49] [Reserved.]

required information in paragraphs (f)(3)(i)(A) and (B) shall be disclosed with equal prominence and in close proximity to any advertised payment that triggered the required disclosures, and that the required information in paragraph (f)(3)(i)(C) shall be disclosed with prominence and in close proximity to the advertised payments.

(4) *Envelope excluded.* The requirements in paragraphs (f)(2) and (f)(3) of this section do not apply to an envelope in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.

(g) *Alternative disclosures—television or radio advertisements.* An advertisement made through television or radio stating any of the terms requiring additional disclosures under paragraph (d)(2) of this section may comply with paragraph (d)(2) of this section either by:

(1) Stating clearly and conspicuously each of the additional disclosures required under paragraph (d)(2) of this section; or

(2) Stating clearly and conspicuously the information required by paragraph (d)(2)(iii) of this section and listing a toll-free telephone number, or any telephone number that allows a consumer to reverse the phone charges when calling for information, along with a reference that such number may be used by consumers to obtain additional cost information.

(h) *Tax implications.* If an advertisement distributed in paper form or through the Internet (rather than by radio or television) is for a loan secured by the consumer's principal dwelling, and the advertisement states that the advertised extension of credit may exceed the fair market value of the dwelling, the advertisement shall clearly and conspicuously state that:

(1) The interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(2) The consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

(i) *Prohibited acts or practices in advertisements for credit secured by a dwelling.* The following acts or practices are prohibited in advertisements for credit secured by a dwelling:

(1) *Misleading advertising of ''fixed'' rates and payments.* Using the word ''fixed'' to refer to rates, payments, or the credit transaction in an advertisement for variable-rate transactions or other transactions where the payment will increase, unless:

(i) In the case of an advertisement solely for one or more variable-rate transactions,

(A) The phrase ''Adjustable-Rate Mortgage,'' ''Variable-Rate Mortgage,'' or ''ARM'' appears in the advertisement before the first use of the word ''fixed'' and is at least as conspicuous as any use of the word ''fixed'' in the advertisement; and

(B) Each use of the word ''fixed'' to refer to a rate or payment is accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed, and the fact that the rate may vary or the payment may increase after that period;

(ii) In the case of an advertisement solely for non-variable-rate transactions where the payment will increase (*e.g.*, a stepped-rate mortgage transaction with an initial lower payment), each use of the word ''fixed'' to refer to the payment is accompanied by an equally prominent and closely proximate statement of the time period for which the payment is fixed, and the fact that the payment will increase after that period; or

(iii) In the case of an advertisement for both variable-rate transactions and non-variable-rate transactions,

(A) The phrase ''Adjustable-Rate Mortgage,'' ''Variable-Rate Mortgage,'' or ''ARM'' appears in the advertisement with equal prominence as any use of the term ''fixed,'' ''Fixed-Rate Mortgage,'' or similar terms; and

(B) Each use of the word ''fixed'' to refer to a rate, payment, or the credit transaction either refers solely to the transactions for which rates are fixed and complies with paragraph (i)(1)(ii) of this section, if applicable, or, if it refers to the variable-rate transactions, is accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed, and the fact that the rate may vary or the payment may increase after that period.

(2) *Misleading comparisons in advertisements.* Making any comparison in an advertisement between actual or hypothetical credit payments or rates and any payment or simple annual rate that will be available under the advertised product for a period less than the full term of the loan, unless:

(i) *In general.* The advertisement includes a clear and conspicuous comparison to the information required to be disclosed under sections 226.24(f)(2) and (3); and

(ii) *Application to variable-rate transactions.* If the advertisement is for a variable-rate transaction, and the advertised payment or simple annual rate is based on the index and margin that will be used to make subsequent rate or payment adjustments over the term of the loan, the advertisement includes an equally prominent statement in close proximity to the payment or rate that the payment or rate is subject to adjustment and the time period when the first adjustment will occur.

(3) *Misrepresentations about government endorsement.* Making any statement in an advertisement that the product offered is a ''government loan program'', ''government-supported loan'', or is otherwise endorsed or sponsored by any federal, state, or local government entity, unless the advertisement is for an FHA loan, VA loan, or similar loan program that is, in fact, endorsed or sponsored by a federal, state, or local government entity.

(4) *Misleading use of the current lender's name.* Using the name of the consumer's current lender in an advertisement that is not sent by or on behalf of the consumer's current lender, unless the advertisement:

(i) Discloses with equal prominence the name of the person or creditor making the advertisement; and

(ii) Includes a clear and conspicuous statement that the person making the advertisement is not associated with, or acting on behalf of, the consumer's current lender.

(5) *Misleading claims of debt elimination.* Making any misleading claim in an advertisement that the mortgage product offered will eliminate debt or result in a waiver or forgiveness of a consumer's existing loan terms with, or obligations to, another creditor.

(6) *Misleading use of the term ''counselor''.* Using the term ''counselor'' in an advertisement to refer to a for-profit mortgage broker or mortgage creditor, its employees, or persons working for the broker or creditor that are involved in offering, originating or selling mortgages.

(7) *Misleading foreign-language advertisements.* Providing information about some trigger terms or required disclosures, such as an initial rate or payment, only in a foreign language in an advertisement, but providing information about other trigger terms or required disclosures, such as information about the fully-indexed rate or fully amortizing payment, only in English in the same advertisement.

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 9. Section 226.32 is amended by revising paragraphs (d)(6) and (d)(7) to read as follows:

§ 226.32 Requirements for certain closed-end home mortgages.

* * * * *

(d) * * *

(6) *Prepayment penalties.* Except as allowed under paragraph (d)(7) of this section, a penalty for paying all or part of the principal before the date on which the principal is due. A prepayment penalty includes computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d).

(7) *Prepayment penalty exception.* A mortgage transaction subject to this section may provide for a prepayment penalty (including a refund calculated according to the rule of 78s) otherwise permitted by law if, under the terms of the loan:

(i) The penalty will not apply after the two-year period following consummation;

(ii) The penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or an affiliate of the creditor;

(iii) At consummation, the consumer's total monthly debt payments (including amounts owed under the mortgage) do not exceed 50 percent of the consumer's monthly gross income, as verified in accordance with § 226.34(a)(4)(ii); and

(iv) The amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation.

* * * * *

■ 10. Section 226.34 is amended by revising the heading and paragraph (a)(4) to read as follows:

§ 226.34 Prohibited acts or practices in connection with credit subject to § 226.32.

(a) * * *

(4) *Repayment ability.* Extend credit subject to § 226.32 to a consumer based on the value of the consumer's collateral without regard to the consumer's repayment ability as of consummation, including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and mortgage-related obligations.

(i) *Mortgage-related obligations.* For purposes of this paragraph (a)(4), mortgage-related obligations are expected property taxes, premiums for mortgage-related insurance required by the creditor as set forth in § 226.35(b)(3)(i), and similar expenses.

(ii) *Verification of repayment ability.* Under this paragraph (a)(4) a creditor must verify the consumer's repayment ability as follows:

(A) A creditor must verify amounts of income or assets that it relies on to determine repayment ability, including expected income or assets, by the consumer's Internal Revenue Service Form W–2, tax returns, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets.

(B) Notwithstanding paragraph (a)(4)(ii)(A), a creditor has not violated paragraph (a)(4)(ii) if the amounts of income and assets that the creditor relied upon in determining repayment ability are not materially greater than the amounts of the consumer's income or assets that the creditor could have verified pursuant to paragraph (a)(4)(ii)(A) at the time the loan was consummated.

(C) A creditor must verify the consumer's current obligations.

(iii) *Presumption of compliance.* A creditor is presumed to have complied with this paragraph (a)(4) with respect to a transaction if the creditor:

(A) Verifies the consumer's repayment ability as provided in paragraph (a)(4)(ii);

(B) Determines the consumer's repayment ability using the largest payment of principal and interest scheduled in the first seven years following consummation and taking into account current obligations and mortgage-related obligations as defined in paragraph (a)(4)(i); and

(C) Assesses the consumer's repayment ability taking into account at least one of the following: The ratio of total debt obligations to income, or the income the consumer will have after paying debt obligations.

(iv) *Exclusions from presumption of compliance.* Notwithstanding the previous paragraph, no presumption of compliance is available for a transaction for which:

(A) The regular periodic payments for the first seven years would cause the principal balance to increase; or

(B) The term of the loan is less than seven years and the regular periodic payments when aggregated do not fully amortize the outstanding principal balance.

(v) *Exemption.* This paragraph (a)(4) does not apply to temporary or ''bridge'' loans with terms of twelve months or less, such as a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within twelve months.

* * * * *

■ 11. New § 226.35 is added to read as follows:

§ 226.35 Prohibited acts or practices in connection with higher-priced mortgage loans.

(a) *Higher-priced mortgage loans*—(1) For purposes of this section, a higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for loans secured by a first lien on a dwelling, or by 3.5 or more percentage points for loans secured by a subordinate lien on a dwelling.

(2) ''Average prime offer rate'' means an annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. The Board publishes average prime offer rates for a broad range of types of transactions in a table updated at least weekly as well as the methodology the Board uses to derive these rates.

(3) Notwithstanding paragraph (a)(1) of this section, the term ''higher-priced mortgage loan'' does not include a transaction to finance the initial construction of a dwelling, a temporary or ''bridge'' loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within twelve months, a reverse-mortgage transaction subject to § 226.33, or a home equity line of credit subject to § 226.5b.

(b) *Rules for higher-priced mortgage loans.* Higher-priced mortgage loans are subject to the following restrictions:

(1) *Repayment ability.* A creditor shall not extend credit based on the value of the consumer's collateral without regard to the consumer's repayment ability as of consummation as provided in § 226.34(a)(4).

(2) *Prepayment penalties.* A loan may not include a penalty described by § 226.32(d)(6) unless:

(i) The penalty is otherwise permitted by law, including § 226.32(d)(7) if the loan is a mortgage transaction described in § 226.32(a); and

(ii) Under the terms of the loan—

(A) The penalty will not apply after the two-year period following consummation;

(B) The penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or an affiliate of the creditor; and

(C) The amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation.

(3) *Escrows*—(i) *Failure to escrow for property taxes and insurance.* Except as provided in paragraph (b)(3)(ii) of this section, a creditor may not extend a loan secured by a first lien on a principal dwelling unless an escrow account is established before consummation for payment of property taxes and premiums for mortgage-related insurance required by the creditor, such as insurance against loss of or damage to property, or against liability arising out of the ownership or use of the property, or insurance protecting the creditor against the consumer's default or other credit loss.

(ii) *Exemptions for loans secured by shares in a cooperative and for certain condominium units*—(A) Escrow accounts need not be established for loans secured by shares in a cooperative; and

(B) Insurance premiums described in paragraph (b)(3)(i) of this section need not be included in escrow accounts for loans secured by condominium units, where the condominium association has an obligation to the condominium unit owners to maintain a master policy insuring condominium units.

(iii) *Cancellation.* A creditor or servicer may permit a consumer to cancel the escrow account required in paragraph (b)(3)(i) of this section only in response to a consumer's dated written request to cancel the escrow account that is received no earlier than 365 days after consummation.

(iv) *Definition of escrow account.* For purposes of this section, ''escrow account'' shall have the same meaning as in 24 CFR 3500.17(b) as amended.

(4) *Evasion; open-end credit.* In connection with credit secured by a consumer's principal dwelling that does not meet the definition of open-end credit in § 226.2(a)(20), a creditor shall not structure a home-secured loan as an open-end plan to evade the requirements of this section.

■ 12. New § 226.36 is added to read as follows:

§ 226.36 Prohibited acts or practices in connection with credit secured by a consumer's principal dwelling.

(a) *Mortgage broker defined.* For purposes of this section, the term ''mortgage broker'' means a person, other than an employee of a creditor, who for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person. The term includes a person meeting this definition, even if the consumer credit obligation is initially payable to such person, unless the person provides the funds for the transaction at consummation out of the person's own resources, out of deposits held by the person, or by drawing on a bona fide warehouse line of credit.

(b) *Misrepresentation of value of consumer's dwelling*—(1) *Coercion of appraiser.* In connection with a consumer credit transaction secured by a consumer's principal dwelling, no creditor or mortgage broker, and no affiliate of a creditor or mortgage broker shall directly or indirectly coerce, influence, or otherwise encourage an appraiser to misstate or misrepresent the value of such dwelling.

(i) Examples of actions that violate this paragraph (b)(1) include:

(A) Implying to an appraiser that current or future retention of the appraiser depends on the amount at which the appraiser values a consumer's principal dwelling;

(B) Excluding an appraiser from consideration for future engagement because the appraiser reports a value of a consumer's principal dwelling that does not meet or exceed a minimum threshold;

(C) Telling an appraiser a minimum reported value of a consumer's principal dwelling that is needed to approve the loan;

(D) Failing to compensate an appraiser because the appraiser does not value a consumer's principal dwelling at or above a certain amount; and

(E) Conditioning an appraiser's compensation on loan consummation.

(ii) Examples of actions that do not violate this paragraph (b)(1) include:

(A) Asking an appraiser to consider additional information about a consumer's principal dwelling or about comparable properties;

(B) Requesting that an appraiser provide additional information about the basis for a valuation;

(C) Requesting that an appraiser correct factual errors in a valuation;

(D) Obtaining multiple appraisals of a consumer's principal dwelling, so long as the creditor adheres to a policy of selecting the most reliable appraisal, rather than the appraisal that states the highest value;

(E) Withholding compensation from an appraiser for breach of contract or substandard performance of services as provided by contract; and

(F) Taking action permitted or required by applicable federal or state statute, regulation, or agency guidance.

(2) *When extension of credit prohibited.* In connection with a consumer credit transaction secured by a consumer's principal dwelling, a creditor who knows, at or before loan consummation, of a violation of paragraph (b)(1) of this section in connection with an appraisal shall not extend credit based on such appraisal unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of such dwelling.

(3) *Appraiser defined.* As used in this paragraph (b), an appraiser is a person who engages in the business of providing assessments of the value of dwellings. The term ''appraiser'' includes persons that employ, refer, or manage appraisers and affiliates of such persons.

(c) *Servicing practices.* (1) In connection with a consumer credit transaction secured by a consumer's principal dwelling, no servicer shall—

(i) Fail to credit a payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, or except as provided in paragraph (c)(2) of this section;

(ii) Impose on the consumer any late fee or delinquency charge in connection with a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within any applicable grace period; or

(iii) Fail to provide, within a reasonable time after receiving a request from the consumer or any person acting on behalf of the consumer, an accurate statement of the total outstanding balance that would be required to satisfy the consumer's obligation in full as of a specified date.

(2) If a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of 5 days after receipt.

(3) For purposes of this paragraph (c), the terms ''servicer'' and ''servicing'' have the same meanings as provided in 24 CFR 3500.2(b), as amended.

(d) This section does not apply to a home equity line of credit subject to § 226.5b.

Supplement I to Part 226—Official Staff Interpretations

Subpart A—General

■ 13. In Supplement I to Part 226, under *Section 226.1—Authority, Purpose, Coverage, Organization, Enforcement* *and Liability*, new headings *1(d) Organization* and *Paragraph 1(d)(5)*, and new paragraph 1(d)(5)–1 are added to read as follows:

Section 226.1—Authority, Purpose, Coverage, Organization, Enforcement and Liability

* * * * *

1(d) Organization.

Paragraph 1(d)(5).

1. *Effective dates.* The Board's revisions to Regulation Z published on July 30, 2008 (the ''final rules''), apply to covered loans (including refinance loans and assumptions considered new transactions under 226.20), for which the creditor receives an application on or after October 1, 2009, except for the final rules on advertising, escrows, and loan servicing. The final rules on escrows in § 226.35(b)(3) are effective for covered loans, (including refinancings and assumptions in 226.20) for which the creditor receives an application on or after April 1, 2010; but for such loans secured by manufactured housing on or after October 1, 2010. The final rules applicable to servicers in § 226.36(c) apply to all covered loans serviced on or after October 1, 2009. The final rules on advertising apply to advertisements occurring on or after October 1, 2009. For example, a radio ad occurs on the date it is first broadcast; a solicitation occurs on the date it is mailed to the consumer. The following examples illustrate the application of the effective dates for the final rules.

i. *General.* A refinancing or assumption as defined in 226.20(a) or (b) is a new transaction and is covered by a provision of the final rule if the creditor receives an application for the transaction on or after that provision's effective date. For example, if a creditor receives an application for a refinance loan covered by 226.35(a) on or after October 1, 2009, and the refinance loan is consummated on October 15, 2009, the provision restricting prepayment penalties in § 226.35(b)(2) applies. However, If the transaction were a modification of an existing obligation's terms that does not constitute a refinance loan under § 226.20(a), the final rules, including for example the restriction on prepayment penalties would not apply.

ii. *Escrows.* Assume a consumer applies for a refinance loan to be secured by a dwelling (that is not a manufactured home) on March 15, 2010, and the loan is consummated on April 2, 2010, the escrow rule in 226.35(b)(3) does not apply.

iii. *Servicing.* Assume that a consumer applies for a new loan on August 1, 2009. The loan is consummated on September 1, 2009. The servicing rules in 226.36(c) apply to the servicing of that loan as of October 1, 2009.

■ 14. In Supplement I to Part 226, under Section *226.2—Definitions and Rules of Construction, 2(a) Definitions, 2(a)(6) Business day,* paragraph 2(a)(6)–2 is revised, and under *2(a)(24) Residential mortgage transaction,* paragraphs 2(a)(24)–1 and 2(a)(24)–5.ii are revised, to read as follows:

Section 226.2—Definitions and Rules of Construction

2(a) Definitions.

* * * * *

2(a)(6) Business day.

* * * * *

2. *Recission rule.* A more precise rule for what is a business day (all calendar days except Sundays and the federal legal holidays listed in 5 U.S.C. 6103(a)) applies when the right of rescission, the receipt of disclosures for certain mortgage transactions under section 226.19(a)(1)(ii), or mortgages subject to section 226.32 are involved. (See also comment 31(c)(1)–1.) Four federal legal holidays are identified in 5 U.S.C. 6103(a) by a specific date: New Year's Day, January 1; Independence Day, July 4; Veterans Day, November 11; and Christmas Day, December 25. When one of these holidays (July 4, for example) falls on a Saturday, federal offices and other entities might observe the holiday on the preceding Friday (July 3). The observed holiday (in the example, July 3) is a business day for purposes of rescission, the receipt of disclosures for certain mortgage transactions under section 226.19(a)(1)(ii), or the delivery of disclosures for certain high-cost mortgages covered by section 226.32.

* * * * *

2(a)(24) Residential mortgage transaction.

1. *Relation to other sections.* This term is important in five provisions in the regulation:

i. § 226.4(c)(7)—exclusions from the finance charge.

ii. § 226.15(f)—exemption from the right of rescission.

iii. § 226.18(q)—whether or not the obligation is assumable.

iv. § 226.20(b)—disclosure requirements for assumptions.

v. § 226.23(f)—exemption from the right of rescission.

* * * * *

5. *Acquisition.* * * *

* * * * *

ii. Examples of new transactions involving a previously acquired dwelling include the financing of a balloon payment due under a land sale contract and an extension of credit made to a joint owner of property to buy out the other joint owner's interest. In these instances, disclosures are not required under § 226.18(q) (assumability policies). However, the rescission rules of §§ 226.15 and 226.23 do apply to these new transactions.

* * * * *

Subpart B—Open-End Credit

■ 15. In Supplement I to Part 226, under *Section 226.16—Advertising*, paragraph 16–1 is revised, paragraph 16–2 is redesignated as paragraph 16–6, and new paragraphs 16–2 through 16–5 and 16–7 are added; under *16(d) Additional requirements for home-equity plans*, paragraph 16(d)–3 is revised, paragraphs 16(d)–5, 16(d)–6, and 16(d)–7 are redesignated as paragraphs 16(d)–7, 16(d)–8, and 16(d)–9, respectively, new paragraphs 16(d)–5 and 16(d)–6 are added, and newly designated paragraphs 16(d)–7 and 16(d)–9 are revised; and new heading *16(e) Alternative disclosures—television or radio advertisements* is added, and new paragraphs 16(e)–1 and 16(e)–2 are added, to read as follows:

Section 226.16—Advertising

1. *Clear and conspicuous standard—general.* Section 226.16 is subject to the general ''clear and conspicuous'' standard for subpart B (*see* § 226.5(a)(1)) but prescribes no specific rules for the format of the necessary disclosures, aside from the format requirements related to the disclosure of a promotional rate under § 226.16(d)(6). Aside from the terms described in § 226.16(d)(6), the credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement.

2. *Clear and conspicuous standard—promotional rates or payments for home-equity plans.* For purposes of § 226.16(d)(6), a clear and conspicuous disclosure means that the required information in § 226.16(d)(6)(ii)(A)–(C) is disclosed with equal prominence and in close proximity to the promotional rate or payment to which it applies. If the information in § 226.16(d)(6)(ii)(A)–(C) is the same type size and is located immediately next to or directly above or below the promotional rate or payment to which it applies, without any intervening text or graphical displays, the disclosures would be deemed to be equally prominent and in close proximity. Notwithstanding the above, for electronic advertisements that disclose promotional rates or payments, compliance with the requirements of § 226.16(c) is deemed to satisfy the clear and conspicuous standard.

3. *Clear and conspicuous standard—Internet advertisements for home-equity plans.* For purposes of this section, a clear and conspicuous disclosure for visual text advertisements on the Internet for home-equity plans subject to the requirements of § 226.5b means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices and comply with all other requirements for clear and conspicuous disclosures under § 226.16(d). *See also* comment 16(c)(1)–2.

4. *Clear and conspicuous standard—televised advertisements for home-equity plans.* For purposes of this section, including alternative disclosures as provided for by § 226.16(e), a clear and conspicuous disclosure in the context of visual text advertisements on television for home-equity plans subject to the requirements of § 226.5b means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices, are displayed in a manner that allows for a consumer to read the information required to be disclosed, and comply with all other requirements for clear and conspicuous disclosures under § 226.16(d). For example, very fine print in a television advertisement would not meet the clear and conspicuous standard if consumers cannot see and read the information required to be disclosed.

5. *Clear and conspicuous standard—oral advertisements for home-equity plans.* For purposes of this section, including alternative disclosures as provided for by § 226.16(e), a clear and conspicuous disclosure in the context of an oral advertisement for home-equity plans subject to the requirements of § 226.5b, whether by radio, television, the Internet, or other medium, means that the required disclosures are given at a speed and volume sufficient for a consumer to hear and comprehend them. For example, information stated very rapidly at a low volume in a radio or television advertisement would not meet the clear and conspicuous standard if consumers cannot hear and comprehend the information required to be disclosed.

6. *Expressing the annual percentage rate in abbreviated form.* * * *

7. *Effective date.* For guidance on the applicability of the Board's revisions to § 226.16 published on July 30, 2008, see comment 1(d)(5)–1.

* * * * *

16(d) Additional requirements for home-equity plans.

* * * * *

3. *Statements of tax deductibility.* An advertisement that refers to deductibility for tax purposes is not misleading if it includes a statement such as ''consult a tax advisor regarding the deductibility of interest.'' An advertisement distributed in paper form or through the Internet (rather than by radio or television) that states that the advertised extension of credit may exceed the fair market value of the consumer's dwelling is not misleading if it clearly and conspicuously states the required information in §§ 226.16(d)(4)(i) and (ii).

* * * * *

5. *Promotional rates and payments in advertisements for home-equity plans.* Section 226.16(d)(6) requires additional disclosures for promotional rates or payments.

i. *Variable-rate plans.* In advertisements for variable-rate plans, if the advertised annual percentage rate is based on (or the advertised payment is derived from) the index and margin that will be used to make rate (or payment) adjustments over the term of the loan, then there is no promotional rate or promotional payment. If, however, the advertised annual percentage rate is not based on (or the advertised payment is not derived from) the index and margin that will be used to make rate (or payment) adjustments, and a reasonably current application of the index and margin would result in a higher annual percentage rate (or, given an assumed balance, a higher payment) then there is a promotional rate or promotional payment.

ii. *Equal prominence, close proximity.* Information required to be disclosed in § 226.16(d)(6)(ii) that is immediately next to or directly above or below the promotional rate or payment (but not in a footnote) is deemed to be closely proximate to the listing. Information required to be disclosed in § 226.16(d)(6)(ii) that is in the same type size as the promotional rate or payment is deemed to be equally prominent.

iii. *Amounts and time periods of payments.* Section 226.16(d)(6)(ii)(C) requires disclosure of the amount and time periods of any payments that will apply under the plan. This section may require disclosure of several payment amounts, including any balloon payment. For example, if an advertisement for a home-equity plan offers a $100,000 five-year line of credit and assumes that the entire line is drawn resulting in a minimum payment of $800 per month for the first six months, increasing to $1,000 per month after month six, followed by a $50,000 balloon payment after five years, the advertisement must disclose the amount and time period of each of the two monthly payment streams, as well as the amount and timing of the balloon payment, with equal prominence and in close proximity to the promotional payment. However, if the final payment could not be more than twice the amount of other minimum payments, the final payment need not be disclosed.

iv. *Plans other than variable-rate plans.* For a plan other than a variable-rate plan, if an advertised payment is calculated in the same way as other payments based on an assumed balance, the fact that the minimum payment could increase solely if the consumer made an additional draw does not make the payment a promotional payment. For example, if a payment of $500 results from an assumed $10,000 draw, and the payment would increase to $1,000 if the consumer made an additional $10,000 draw, the payment is not a promotional payment.

v. *Conversion option.* Some home-equity plans permit the consumer to repay all or part of the balance during the draw period at a fixed rate (rather than a variable rate) and over a specified time period. The fixed-rate conversion option does not, by itself, make the rate or payment that would apply if the consumer exercised the fixed-rate conversion option a promotional rate or payment.

vi. *Preferred-rate provisions.* Some home-equity plans contain a preferred-rate provision, where the rate will increase upon the occurrence of some event, such as the consumer-employee leaving the creditor's employ, the consumer closing an existing deposit account with the creditor, or the consumer revoking an election to make automated payments. A preferred-rate provision does not, by itself, make the rate or payment under the preferred-rate provision a promotional rate or payment.

6. *Reasonably current index and margin.* For the purposes of this section, an index and margin is considered reasonably current if:

i. For direct mail advertisements, it was in effect within 60 days before mailing;

ii. For advertisements in electronic form it was in effect within 30 days before the advertisement is sent to a consumer's e-mail address, or in the case of an advertisement made on an Internet Web site, when viewed by the public; or

iii. For printed advertisements made available to the general public, including ones contained in a catalog, magazine, or other generally available publication, it was in effect within 30 days before printing.

7. *Relation to other sections.* Advertisements for home-equity plans must comply with all provisions in § 226.16 not solely the rules in § 226.16(d). If an advertisement contains information (such as the payment terms) that triggers the duty under § 226.16(d) to state the annual percentage rate, the additional disclosures in § 226.16(b) must be provided in the advertisement. While § 226.16(d) does not require a statement of fees to use or maintain the plan (such as membership fees and transaction charges), such fees must be disclosed under § 226.16(b)(1) and (3).

* * * * *

9. *Balloon payment.* See comment 5b(d)(5)(ii)–3 for information not required to be stated in advertisements, and on situations in which the balloon payment requirement does not apply.

16(e) Alternative disclosures—television or radio advertisements.

1. *Multi-purpose telephone number.* When an advertised telephone number provides a recording, disclosures should be provided early in the sequence to ensure that the consumer receives the required disclosures. For example, in providing several options—such as providing directions to the advertiser's place of business—the option allowing the consumer to request disclosures should be provided early in the telephone message to ensure that the option to request disclosures is not obscured by other information.

2. *Statement accompanying telephone number.* Language must accompany a telephone number indicating that disclosures are available by calling the telephone number, such as ''call 1–800–000–0000 for details about credit costs and terms.''

Subpart C—Closed-End Credit

■ 16. In Supplement I to Part 226, under *Section 226.17—General Disclosure Requirements, 17(c) Basis of disclosures and use of estimates, Paragraph 17(c)(1)*, paragraph 17(c)(1)–8 is revised, and under *17(f) Early disclosures*, paragraph 17(f)–4 is revised, to read as follows:

Section 226.17—General Disclosure Requirements

* * * * *

17(c) Basis of disclosures and use of estimates.

* * * * *

Paragraph 17(c)(1).

* * * * *

8. *Basis of disclosures in variable-rate transactions.* The disclosures for a variable-rate transaction must be given for the full term of the transaction and must be based on the terms in effect at the time of consummation. Creditors should base the disclosures only on the initial rate and should not assume that this rate will increase. For example, in a loan with an initial rate of 10 percent and a 5 percentage points rate cap, creditors should base the disclosures on the initial rate and should not assume that this rate will increase 5 percentage points. However, in a variable-rate transaction with a seller buydown that is reflected in the credit contract, a consumer

buydown, or a discounted or premium rate, disclosures should not be based solely on the initial terms. In those transactions, the disclosed annual percentage rate should be a composite rate based on the rate in effect during the initial period and the rate that is the basis of the variable-rate feature for the remainder of the term. (See the commentary to § 226.17(c) for a discussion of buydown, discounted, and premium transactions and the commentary to § 226.19(a)(2) for a discussion of the redisclosure in certain mortgage transactions with a variable-rate feature.)

* * * * *

17(f) Early disclosures.

* * * * *

4. *Special rules.* In mortgage transactions subject to § 226.19, the creditor must redisclose if, between the delivery of the required early disclosures and consummation, the annual percentage rate changes by more than a stated tolerance. When subsequent events occur after consummation, new disclosures are required only if there is a refinancing or an assumption within the meaning of § 226.20.

* * * * *

■ 17. In Supplement I to Part 226, under *Section 226.19—Certain Residential Mortgage and Variable-Rate Transactions*, the heading is revised, heading *19(a)(1) Time of disclosure* is redesignated as heading *19(a)(1)(i) Time of disclosure*, paragraphs 19(a)(1)(i)–1 and 19(a)(1)(i)–5 are revised, new heading *19(a)(1)(ii) Imposition of fees* and new paragraphs 19(a)(1)(ii)–1 through 19(a)(1)(ii)–3 are added , and new heading *19(a)(1)(iii) Exception to fee restriction* and new paragraph 19(a)(1)(iii)–1 are added, to read as follows:

Section 226.19—Certain Mortgage and Variable-Rate Transactions

19(a)(1)(i) Time of disclosure.

1. *Coverage.* This section requires early disclosure of credit terms in mortgage transactions that are secured by a consumer's principal dwelling and also subject to the Real Estate Settlement Procedures Act (RESPA) and its implementing Regulation X, administered by the Department of Housing and Urban Development (HUD). To be covered by § 226.19, a transaction must be a federally related mortgage loan under RESPA. ''Federally related mortgage loan'' is defined under RESPA (12 U.S.C. 2602) and Regulation X (24 CFR 3500.2), and is subject to any interpretations by HUD. RESPA coverage includes such transactions as loans to purchase dwellings, refinancings of loans secured by dwellings, and subordinate-lien home-equity loans, among others. Although RESPA coverage relates to any dwelling, § 226.19(a) applies to such transactions only if they are secured by a consumer's principal dwelling. Also, home equity lines of credit subject to § 226.5b are not covered by § 226.19(a). For guidance on the applicability of the Board's revisions to § 226.19(a) published on July 30, 2008, see comment 1(d)(5)–1

* * * * *

5. *Itemization of amount financed.* In many mortgage transactions, the itemization of the amount financed required by § 226.18(c) will contain items, such as origination fees or points, that also must be disclosed as part of the good faith estimates of settlement costs required under RESPA. Creditors furnishing the RESPA good faith estimates need not give consumers any itemization of the amount financed, either with the disclosures provided within three days after application or with the disclosures given at consummation or settlement.

19(a)(1)(ii) Imposition of fees.

1. *Timing of fees.* The consumer must receive the disclosures required by this section before paying or incurring any fee imposed by a creditor or other person in connection with the consumer's application for a mortgage transaction that is subject to § 226.19(a)(1)(i), except as provided in § 226.19(a)(1)(iii). If the creditor delivers the disclosures to the consumer in person, a fee may be imposed anytime after delivery. If the creditor places the disclosures in the mail, the creditor may impose a fee after the consumer receives the disclosures or, in all cases, after midnight on the third business day following mailing of the disclosures. For purposes of § 226.19(a)(1)(ii), the term ''business day'' means all calendar days except Sundays and legal public holidays referred to in § 226.2(a)(6). *See* Comment 2(a)(6)–2. For example, assuming that there are no intervening legal public holidays, a creditor that receives the consumer's written application on Monday and mails the early mortgage loan disclosure on Tuesday may impose a fee on the consumer after midnight on Friday.

2. *Fees restricted.* A creditor or other person may not impose any fee, such as for an appraisal, underwriting, or broker services, until the consumer has received the disclosures required by § 226.19(a)(1)(i). The only exception to the fee restriction allows the creditor or other person to impose a *bona fide* and reasonable fee for obtaining a consumer's credit history, such as for a credit report(s).

3. *Collection of fees.* A creditor complies with § 226.19(a)(1)(ii) if—

i. The creditor receives a consumer's written application directly from the consumer and does not collect any fee, other than a fee for obtaining a consumer's credit history, until the consumer receives the early mortgage loan disclosure.

ii. A third party submits a consumer's written application to a creditor and both the creditor and third party do not collect any fee, other than a fee for obtaining a consumer's credit history, until the consumer receives the early mortgage loan disclosure from the creditor.

iii. A third party submits a consumer's written application to a second creditor following a prior creditor's denial of an application made by the same consumer (or following the consumer's withdrawal), and, if a fee already has been assessed, the new creditor or third party does not collect or impose any additional fee until the consumer receives an early mortgage loan disclosure from the new creditor.

19(a)(1)(iii) Exception to fee restriction.

1. *Requirements.* A creditor or other person may impose a fee before the consumer receives the required disclosures if it is for obtaining the consumer's credit history, such as by purchasing a credit report(s) on the consumer. The fee also must be *bona fide* and reasonable in amount. For example, a creditor may collect a fee for obtaining a credit report(s) if it is in the creditor's ordinary course of business to obtain a credit report(s). If the criteria in § 226.19(a)(1)(iii) are met, the creditor may describe or refer to this fee, for example, as an ''application fee.''

* * * * *

■ 18. In Supplement I to Part 226, under *Section 226.24—Advertising*, paragraph 24–1 is revised; heading *24(d) Catalogs or other multiple-page advertisements; electronic advertisements* and paragraphs 24(d)–1 through 24(d)–4 are redesignated as heading *24(e) Catalogs or other multiple-page advertisements; electronic advertisements* and paragraphs 24(e)–1 through 24(e)–4, respectively; headings *24(c) Advertisements of terms that require additional disclosures, Paragraph 24(c)(1)*, and *Paragraph 24(c)(2)* and paragraphs 24(c)–1, 24(c)(1)–1 through 24(c)(1)–4, and 24(c)(2)–1 through 24(c)(2)–4 are redesignated as headings 24(d) *Advertisements of terms that require additional disclosures, Paragraph 24(d)(1)*, and *Paragraph 24(d)(2)* and paragraphs 24(d)–1, 24(d)(1)–1 through 24(d)(1)–4, and 24(d)(2)–1 through 24(d)(2)–4, respectively; heading *24(b) Advertisement of rate of finance charge* and paragraphs 24(b)–1 through 24(b)–5 are redesignated as heading *24(c) Advertisement of rate of finance charge* and paragraphs 24(c)–1 through 24(c)–5, respectively; new heading *24(b) Clear and conspicuous standard* and new paragraphs 24(b)–1 through 24(b)–5 are added; newly designated paragraphs 24(c)–2 and 24(c)–3 are revised, newly designated paragraph 24(c)–4 is removed, and newly designated paragraph 24(c)–5 is further redesignated as 24(c)–4 and revised; newly designated paragraphs 24(d)–1, 24(d)(1)–3, and 24(d)(2)–2 are revised, newly designated paragraphs 24(d)(2)–3 and 24(d)(2)–4 are further redesignated as 24(d)(2)–4 and 24(d)(2)–5, respectively, new paragraph 24(d)(2)–3 is added, and newly designated paragraph 24(d)(2)–5 is revised; newly designated paragraph 24(e)–1, 24(e)–2, and 24(e)–4 are revised; and new headings *24(f) Disclosure of rates and payments in advertisements for credit secured by a dwelling*, *24(f)(3) Disclosure of payments*, *24(g) Alternative disclosures—television or* *radio advertisements,* and *24(i) Prohibited acts or practices in advertisements for credit secured by a dwelling* and new paragraphs 24(f)–1 through 24(f)–6, 24(f)(3)–1, 24(f)(3)–2, 24(g)–1, 24(g)–2, and 24(i)–1 through 24(i)–3 are added, to read as follows:

Section 226.24—Advertising

1. *Effective date.* For guidance on the applicability of the Board's changes to § 226.24 published on July 30, 2008, see comment 1(d)(5)–1.

* * * * *

24(b) Clear and conspicuous standard.

1. *Clear and conspicuous standard—general.* This section is subject to the general ''clear and conspicuous'' standard for this subpart, *see* § 226.17(a)(1), but prescribes no specific rules for the format of the necessary disclosures, other than the format requirements related to the advertisement of rates and payments as described in comment 24(b)–2 below. The credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement. For example, a merchandise tag that is an advertisement under the regulation complies with this section if the necessary credit terms are on both sides of the tag, so long as each side is accessible.

2. *Clear and conspicuous standard—rates and payments in advertisements for credit secured by a dwelling.* For purposes of § 226.24(f), a clear and conspicuous disclosure means that the required information in §§ 226.24(f)(2)(i) and 226.24(f)(3)(i)(A) and (B) is disclosed with equal prominence and in close proximity to the advertised rates or payments triggering the required disclosures, and that the required information in § 226.24(f)(3)(i)(C) is disclosed prominently and in close proximity to the advertised rates or payments triggering the required disclosures. If the required information in §§ 226.24(f)(2)(i) and 226.24(f)(3)(i)(A) and (B) is the same type size as the advertised rates or payments triggering the required disclosures, the disclosures are deemed to be equally prominent. The information in § 226.24(f)(3)(i)(C) must be disclosed prominently, but need not be disclosed with equal prominence or be the same type size as the payments triggering the required disclosures. If the required information in §§ 226.24(f)(2)(i) and 226.24(f)(3)(i) is located immediately next to or directly above or below the advertised rates or payments triggering the required disclosures, without any intervening text or graphical displays, the disclosures are deemed to be in close proximity. Notwithstanding the above, for electronic advertisements that disclose rates or payments, compliance with the requirements of § 226.24(e) is deemed to satisfy the clear and conspicuous standard.

3. *Clear and conspicuous standard—Internet advertisements for credit secured by a dwelling.* For purposes of this section, a clear and conspicuous disclosure for visual text advertisements on the Internet for credit secured by a dwelling means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices and comply with all other requirements for clear and conspicuous disclosures under § 226.24. *See also* comment 24(e)–4.

4. *Clear and conspicuous standard—televised advertisements for credit secured by a dwelling.* For purposes of this section, including alternative disclosures as provided for by § 226.24(g), a clear and conspicuous disclosure in the context of visual text advertisements on television for credit secured by a dwelling means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices, are displayed in a manner that allows a consumer to read the information required to be disclosed, and comply with all other requirements for clear and conspicuous disclosures under § 226.24. For example, very fine print in a television advertisement would not meet the clear and conspicuous standard if consumers cannot see and read the information required to be disclosed.

5. *Clear and conspicuous standard—oral advertisements for credit secured by a dwelling.* For purposes of this section, including alternative disclosures as provided for by § 226.24(g), a clear and conspicuous disclosure in the context of an oral advertisement for credit secured by a dwelling, whether by radio, television, or other medium, means that the required disclosures are given at a speed and volume sufficient for a consumer to hear and comprehend them. For example, information stated very rapidly at a low volume in a radio or television advertisement would not meet the clear and conspicuous standard if consumers cannot hear and comprehend the information required to be disclosed.

24(c) Advertisement of rate of finance charge.

* * * * *

2. *Simple or periodic rates.* The advertisement may not simultaneously state any other rate, except that a simple annual rate or periodic rate applicable to an unpaid balance may appear along with (but not more conspicuously than) the annual percentage rate. An advertisement for credit secured by a dwelling may not state a periodic rate, other than a simple annual rate, that is applied to an unpaid balance. For example, in an advertisement for credit secured by a dwelling, a simple annual interest rate may be shown in the same type size as the annual percentage rate for the advertised credit, subject to the requirements of section 226.24(f). A simple annual rate or periodic rate that is applied to an unpaid balance is the rate at which interest is accruing; those terms do not include a rate lower than the rate at which interest is accruing, such as an effective rate, payment rate, or qualifying rate.

3. *Buydowns.* When a third party (such as a seller) or a creditor wishes to promote the availability of reduced interest rates (consumer or seller buydowns), the advertised annual percentage rate must be determined in accordance with the commentary to § 226.17(c) regarding the basis of transactional disclosures for buydowns. The seller or creditor may advertise the reduced simple interest rate, provided the advertisement shows the limited term to which the reduced rate applies and states the simple interest rate applicable to the balance of the term. The advertisement may also show the effect of the buydown agreement on the payment schedule for the buydown period, but this will trigger the additional disclosures under § 226.24(d)(2).

4. *Discounted variable-rate transactions.* The advertised annual percentage rate for discounted variable-rate transactions must be determined in accordance with comment 17(c)(1)–10 regarding the basis of transactional disclosures for such financing.

i. A creditor or seller may promote the availability of the initial rate reduction in such transactions by advertising the reduced simple annual rate, provided the advertisement shows with equal prominence and in close proximity the limited term to which the reduced rate applies and the annual percentage rate that will apply after the term of the initial rate reduction expires. *See* § 226.24(f).

ii. Limits or caps on periodic rate or payment adjustments need not be stated. To illustrate using the second example in comment 17(c)(1)–10, the fact that the rate is presumed to be 11 percent in the second year and 12 percent for the remaining 28 years need not be included in the advertisement.

iii. The advertisement may also show the effect of the discount on the payment schedule for the discount period, but this will trigger the additional disclosures under § 226.24(d).

24(d) Advertisement of terms that require additional disclosures.

1. *General rule.* Under § 226.24(d)(1), whenever certain triggering terms appear in credit advertisements, the additional credit terms enumerated in § 226.24(d)(2) must also appear. These provisions apply even if the triggering term is not stated explicitly but may be readily determined from the advertisement. For example, an advertisement may state ''80 percent financing available,'' which is in fact indicating that a 20 percent downpayment is required.

Paragraph 24(d)(1).

* * * * *

3. *Payment amount.* The dollar amount of any payment includes statements such as:

- ''Payable in installments of $103''.
- ''$25 weekly''.
- ''$500,000 loan for just $1,650 per month''.
- ''$1,200 balance payable in 10 equal installments''.

In the last example, the amount of each payment is readily determinable, even though not explicitly stated. But statements such as ''monthly payments to suit your needs'' or ''regular *monthly* payments'' are not deemed to be statements of the amount of any payment.

* * * * *

Paragraph 24(d)(2).

* * * * *

2. *Disclosure of repayment terms.* The phrase ''terms of repayment'' generally has the same meaning as the ''payment schedule'' required to be disclosed under § 226.18(g). Section 226.24(d)(2)(ii) provides flexibility to

creditors in making this disclosure for advertising purposes. Repayment terms may be expressed in a variety of ways in addition to an exact repayment schedule; this is particularly true for advertisements that do not contemplate a single specific transaction. Repayment terms, however, must reflect the consumer's repayment obligations over the full term of the loan, including any balloon payment, *see* comment 24(d)(2)–3, not just the repayment terms that will apply for a limited period of time. For example:

i. A creditor may use a unit-cost approach in making the required disclosure, such as ''48 monthly payments of $27.83 per $1,000 borrowed.''

ii. In an advertisement for credit secured by a dwelling, when any series of payments varies because of the inclusion of mortgage insurance premiums, a creditor may state the number and timing of payments, the fact that payments do not include amounts for mortgage insurance premiums, and that the actual payment obligation will be higher.

iii. In an advertisement for credit secured by a dwelling, when one series of monthly payments will apply for a limited period of time followed by a series of higher monthly payments for the remaining term of the loan, the advertisement must state the number and time period of each series of payments, and the amounts of each of those payments. For this purpose, the creditor must assume that the consumer makes the lower series of payments for the maximum allowable period of time.

3. *Balloon payment; disclosure of repayment terms.* In some transactions, a balloon payment will occur when the consumer only makes the minimum payments specified in an advertisement. A balloon payment results if paying the minimum payments does not fully amortize the outstanding balance by a specified date or time, usually the end of the term of the loan, and the consumer must repay the entire outstanding balance at such time. If a balloon payment will occur when the consumer only makes the minimum payments specified in an advertisement, the advertisement must state with equal prominence and in close proximity to the minimum payment statement the amount and timing of the balloon payment that will result if the consumer makes only the minimum payments for the maximum period of time that the consumer is permitted to make such payments.

4. *Annual percentage rate.* * * *

5. *Use of examples.* A creditor may use illustrative credit transactions to make the necessary disclosures under § 226.24(d)(2). That is, where a range of possible combinations of credit terms is offered, the advertisement may use examples of typical transactions, so long as each example contains all of the applicable terms required by § 226.24(d). The examples must be labeled as such and must reflect representative credit terms made available by the creditor to present and prospective customers.

24(e) Catalogs or other multiple-page advertisements; electronic advertisements.

1. *Definition.* The multiple-page advertisements to which this section refers are advertisements consisting of a series of sequentially numbered pages—for example, a supplement to a newspaper. A mailing consisting of several separate flyers or pieces of promotional material in a single envelope does not constitute a single multiple-page advertisement for purposes of § 226.24(e).

2. *General.* Section 226.24(e) permits creditors to put credit information together in one place in a catalog or other multiple-page advertisement or in an electronic advertisement (such as an advertisement appearing on an Internet Web site). The rule applies only if the advertisement contains one or more of the triggering terms from § 226.24(d)(1). A list of different annual percentage rates applicable to different balances, for example, does not trigger further disclosures under § 226.24(d)(2) and so is not covered by § 226.24(e).

* * * * *

4. *Electronic advertisement.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) contains the table or schedule permitted under § 226.24(e)(1), any statement of terms set forth in § 226.24(d)(1) appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information.

24(f) Disclosure of rates and payments in advertisements for credit secured by a dwelling.

1. *Applicability.* The requirements of § 226.24(f)(2) apply to advertisements for loans where more than one simple annual rate of interest will apply. The requirements of § 226.24(f)(3)(i)(A) require a clear and conspicuous disclosure of each payment that will apply over the term of the loan. In determining whether a payment will apply when the consumer may choose to make a series of lower monthly payments that will apply for a limited period of time, the creditor must assume that the consumer makes the series of lower payments for the maximum allowable period of time. *See* comment 24(d)(2)–2.iii. However, for purposes of § 226.24(f), the creditor may, but need not, assume that specific events which trigger changes to the simple annual rate of interest or to the applicable payments will occur. For example:

i. *Fixed-rate conversion loans.* If a loan program permits consumers to convert their variable-rate loans to fixed rate loans, the creditor need not assume that the fixed-rate conversion option, by itself, means that more than one simple annual rate of interest will apply to the loan under § 226.24(f)(2) and need not disclose as a separate payment under § 226.24(f)(3)(i)(A) the payment that would apply if the consumer exercised the fixed-rate conversion option.

ii. *Preferred-rate loans.* Some loans contain a preferred-rate provision, where the rate will increase upon the occurrence of some event, such as the consumer-employee leaving the creditor's employ or the consumer closing an existing deposit account with the creditor or the consumer revoking an election to make automated payments. A creditor need not assume that the preferred-rate provision, by itself, means that more than one simple annual rate of interest will apply to the loan under § 226.24(f)(2) and the payments that would apply upon occurrence of the event that triggers the rate increase need not be disclosed as a separate payments under § 226.24(f)(3)(i)(A).

iii. *Rate reductions.* Some loans contain a provision where the rate will decrease upon the occurrence of some event, such as if the consumer makes a series of payments on time. A creditor need not assume that the rate reduction provision, by itself, means that more than one simple annual rate of interest will apply to the loan under § 226.24(f)(2) and need not disclose the payments that would apply upon occurrence of the event that triggers the rate reduction as a separate payments under § 226.24(f)(3)(i)(A).

2. *Equal prominence, close proximity.* Information required to be disclosed under §§ 226.24(f)(2)(i) and 226.24(f)(3)(i) that is immediately next to or directly above or below the simple annual rate or payment amount (but not in a footnote) is deemed to be closely proximate to the listing. Information required to be disclosed under §§ 226.24(f)(2)(i) and 226.24(f)(3)(i)(A) and (B) that is in the same type size as the simple annual rate or payment amount is deemed to be equally prominent.

3. *Clear and conspicuous standard.* For more information about the applicable clear and conspicuous standard, see comment 24(b)–2.

4. *Comparisons in advertisements.* When making any comparison in an advertisement between actual or hypothetical credit payments or rates and the payments or rates available under the advertised product, the advertisement must state all applicable payments or rates for the advertised product and the time periods for which those payments or rates will apply, as required by this section.

5. *Application to variable-rate transactions—disclosure of rates.* In advertisements for variable-rate transactions, if a simple annual rate that applies at consummation is not based on the index and margin that will be used to make subsequent rate adjustments over the term of the loan, the requirements of § 226.24(f)(2)(i) apply.

6. *Reasonably current index and margin.* For the purposes of this section, an index and margin is considered reasonably current if:

i. For direct mail advertisements, it was in effect within 60 days before mailing;

ii. For advertisements in electronic form it was in effect within 30 days before the advertisement is sent to a consumer's e-mail address, or in the case of an advertisement made on an Internet Web site, when viewed by the public; or

iii. For printed advertisements made available to the general public, including ones contained in a catalog, magazine, or other generally available publication, it was in effect within 30 days before printing.

24(f)(3) Disclosure of payments.

1. *Amounts and time periods of payments.* Section 226.24(f)(3)(i) requires disclosure of the amounts and time periods of all payments that will apply over the term of the loan. This section may require disclosure of several payment amounts, including any balloon payment. For example, if an

advertisement for credit secured by a dwelling offers $300,000 of credit with a 30-year loan term for a payment of $600 per month for the first six months, increasing to $1,500 per month after month six, followed by a balloon payment of $30,000 at the end of the loan term, the advertisement must disclose the amount and time periods of each of the two monthly payment streams, as well as the amount and timing of the balloon payment, with equal prominence and in close proximity to each other. However, if the final scheduled payment of a fully amortizing loan is not greater than two times the amount of any other regularly scheduled payment, the final payment need not be disclosed.

2. *Application to variable-rate transactions—disclosure of payments.* In advertisements for variable-rate transactions, if the payment that applies at consummation is not based on the index and margin that will be used to make subsequent payment adjustments over the term of the loan, the requirements of § 226.24(f)(3)(i) apply.

24(g) Alternative disclosures—television or radio advertisements.

1. *Multi-purpose telephone number.* When an advertised telephone number provides a recording, disclosures should be provided early in the sequence to ensure that the consumer receives the required disclosures. For example, in providing several options—such as providing directions to the advertiser's place of business—the option allowing the consumer to request disclosures should be provided early in the telephone message to ensure that the option to request disclosures is not obscured by other information.

2. *Statement accompanying telephone number.* Language must accompany a telephone number indicating that disclosures are available by calling the telephone number, such as ''call 1–800–000–0000 for details about credit costs and terms.''

24(i) Prohibited acts or practices in advertisements for credit secured by a dwelling.

1. *Comparisons in advertisements.* The requirements of § 226.24(i)(2) apply to all advertisements for credit secured by a dwelling, including radio and television advertisements. A comparison includes a claim about the amount a consumer may save under the advertised product. For example, a statement such as ''save $300 per month on a $300,000 loan'' constitutes an implied comparison between the advertised product's payment and a consumer's current payment.

2. *Misrepresentations about government endorsement.* A statement that the federal Community Reinvestment Act entitles the consumer to refinance his or her mortgage at the low rate offered in the advertisement is prohibited because it conveys a misleading impression that the advertised product is endorsed or sponsored by the federal government.

3. *Misleading claims of debt elimination.* The prohibition against misleading claims of debt elimination or waiver or forgiveness does not apply to legitimate statements that the advertised product may reduce debt payments, consolidate debts, or shorten the term of the debt. Examples of misleading claims of debt elimination or waiver or forgiveness of loan terms with, or obligations to, another creditor of debt include: ''Wipe-Out Personal Debts!'', ''New DEBT-FREE Payment'', ''Set yourself free; get out of debt today'', ''Refinance today and wipe your debt clean!'', ''Get yourself out of debt * * * Forever!'', and ''Pre-payment Penalty Waiver.''

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 19. In Supplement I to Part 226, under *Section 226.32–Requirements for Certain Closed-End Home Mortgages, 32(a) Coverage,* new heading *Paragraph 32(a)(2)* and new paragraph 32(a)(2)–1 are added, under *32(d) Limitations,* new paragraphs 32(d)–1 and 32(d)–2 are added, and under *32(d)(7) Prepayment penalty exception, Paragraph 32(d)(7)(iii),* paragraphs 32(d)(7)(iii)–1 and 32(d)(7)(iii)–2 are removed and new paragraphs 32(d)(7)(iii)–1 through 32(d)(7)(iii)–3 are added, and new heading *Paragraph 32(d)(7)(iv)* and new paragraphs 32(d)(7)(iv)–1 and 32(d)(7)(iv)–2 are added, to read as follows:

Section 226.32—Requirements for Certain Closed-End Home Mortgages 32(a) Coverage.

* * * * *

Paragraph 32(a)(2).

1. *Exemption limited.* Section 226.32(a)(2) lists certain transactions exempt from the provisions of § 226.32. Nevertheless, those transactions may be subject to the provisions of § 226.35, including any provisions of § 226.32 to which § 226.35 refers. *See* 12 CFR 226.35(a).

* * * * *

32(d) Limitations.

1. *Additional prohibitions applicable under other sections.* Section 226.34 sets forth certain prohibitions in connection with mortgage credit subject to § 226.32, in addition to the limitations in § 226.32(d). Further, § 226.35(b) prohibits certain practices in connection with transactions that meet the coverage test in § 226.35(a). Because the coverage test in § 226.35(a) is generally broader than the coverage test in § 226.32(a), most § 226.32 mortgage loans are also subject to the prohibitions set forth in § 226.35(b) (such as escrows), in addition to the limitations in § 226.32(d).

2. *Effective date.* For guidance on the application of the Board's revisions published on July 30, 2008 to § 226.32, see comment 1(d)(5)–1.

* * * * *

32(d)(7) Prepayment penalty exception.
Paragraph 32(d)(7)(iii).

1. *Calculating debt-to-income ratio.* ''Debt'' does not include amounts paid by the borrower in cash at closing or amounts from the loan proceeds that directly repay an existing debt. Creditors may consider combined debt-to-income ratios for transactions involving joint applicants. For more information about obligations and inflows that may constitute ''debt'' or ''income'' for purposes of § 226.32(d)(7)(iii), see comment 34(a)(4)–6 and comment 34(a)(4)(iii)(C)–1.

2. *Verification.* Creditors shall verify income in the manner described in § 226.34(a)(4)(ii) and the related comments. Creditors may verify debt with a credit report. However, a credit report may not reflect certain obligations undertaken just before or at consummation of the transaction and secured by the same dwelling that secures the transaction. Section 226.34(a)(4) may require creditors to consider such obligations; see comment 34(a)(4)–3 and comment 34(a)(4)(ii)(C)–1.

3. *Interaction with Regulation B.* Section 226.32(d)(7)(iii) does not require or permit the creditor to make inquiries or verifications that would be prohibited by Regulation B, 12 CFR part 202.

Paragraph 32(d)(7)(iv).

1. *Payment change.* Section 226.32(d)(7) sets forth the conditions under which a mortgage transaction subject to this section may have a prepayment penalty. Section 226.32(d)(7)(iv) lists as a condition that the amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation. The following examples show whether prepayment penalties are permitted or prohibited under § 226.32(d)(7)(iv) in particular circumstances.

i. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is January 1, 2014. A prepayment penalty is permitted with this mortgage transaction provided that the other § 226.32(d)(7) conditions are met, that is: provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before Dec. 31, 2011, the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate, and at consummation the consumer's total monthly debts do not exceed 50 percent of the consumer's monthly gross income, as verified.

ii. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is December 31, 2013. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

iii. Initial payments for a graduated-payment transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is January 1, 2014. A prepayment penalty is permitted with this mortgage transaction provided that the other § 226.32(d)(7) conditions are met, that is: provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before December 31, 2011, the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate, and at consummation the consumer's total monthly debts do not exceed 50 percent of the consumer's monthly gross income, as verified.

iv. Initial payments for a step-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is December 31, 2013. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

2. *Payment changes excluded.* Payment changes due to the following circumstances are not considered payment changes for purposes of this section:

i. A change in the amount of a periodic payment that is allocated to principal or interest that does not change the total amount of the periodic payment.

ii. The borrower's actual unanticipated late payment, delinquency, or default; and

iii. The borrower's voluntary payment of additional amounts (for example when a consumer chooses to make a payment of interest and principal on a loan that only requires the consumer to pay interest).

* * * * *

■ 20. In Supplement I to Part 226, under *Section 226.34—Prohibited Acts or Practices in Connection with Credit Secured by a Consumer's Dwelling; Open-end Credit,* the heading is revised, and under *34(a) Prohibited acts or practices for loans subject to § 226.32, 34(a)(4) Repayment ability,* paragraphs 34(a)(4)–1 through 34(a)(4)–4 are removed, and new paragraphs 34(a)(4)–1 through 34(a)(4)–7, new heading *34(a)(4)(i) Mortgage-related obligations* and new paragraph 34(a)(4)(i)–1, new heading *34(a)(4)(ii) Verification of repayment ability* and new paragraphs 34(a)(4)(ii)–1 through 34(a)(4)(ii)–3, new heading *Paragraph 34(a)(4)(ii)(A)* and new paragraphs 34(a)(4)(ii)(A)–1 through 34(a)(4)(ii)(A)–5, new heading *Paragraph 34(a)(4)(ii)(B)* and new paragraphs 34(a)(4)(ii)(B)–1 and 34(a)(4)(ii)(B)–2, new heading *Paragraph 34(a)(4)(ii)(C)* and new paragraph 34(a)(4)(ii)(C)–1, new heading *34(a)(4)(iii) Presumption of compliance* and new paragraph 34(a)(4)(iii)–1, new heading *Paragraph 34(a)(4)(iii)(B)* and new paragraph 34(a)(4)(iii)(B)–1, new heading Paragraph *34(a)(4)(iii)(C)* and new paragraph 34(a)(4)(iii)(C)–1, and new heading *34(a)(4)(iv) Exclusions from the presumption of compliance* and new paragraphs 34(a)(4)(iv)–1 and 34(a)(4)(iv)–2, are added to read as follows:

Section 226.34—Prohibited Acts or Practices in Connection with Credit Subject to § 226.32

34(a) Prohibited acts or practices for loans subject to § 226.32.

* * * * *

34(a)(4) Repayment ability.

1. *Application of repayment ability rule.* The § 226.34(a)(4) prohibition against making loans without regard to consumers' repayment ability applies to mortgage loans described in § 226.32(a). In addition, the § 226.34(a)(4) prohibition applies to higher-priced mortgage loans described in § 226.35(a). *See* 12 CFR 226.35(b)(1). For guidance on the application of the Board's revisions to § 226.34(a)(4) published on July 30, 2008, see comment 1(d)(5)–1.

2. *General prohibition.* Section 226.34(a)(4) prohibits a creditor from extending credit subject to § 226.32 to a consumer based on the value of the consumer's collateral without regard to the consumer's repayment ability as of consummation, including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and property tax and insurance obligations. A creditor may base its determination of repayment ability on current or reasonably expected income from employment or other sources, on assets other than the collateral, or both.

3. *Other dwelling-secured obligations.* For purposes of § 226.34(a)(4), current obligations include another credit obligation of which the creditor has knowledge undertaken prior to or at consummation of the transaction and secured by the same dwelling that secures the transaction subject to § 226.32 or § 226.35. For example, where a transaction subject to § 226.35 is a first-lien transaction for the purchase of a home, a creditor must consider a ''piggyback'' second-lien transaction of which it has knowledge that is used to finance part of the down payment on the house.

4. *Discounted introductory rates and non-amortizing or negatively-amortizing payments.* A credit agreement may determine a consumer's initial payments using a temporarily discounted interest rate or permit the consumer to make initial payments that are non-amortizing or negatively amortizing. (Negative amortization is permissible for loans covered by § 226.35(a), but not § 226.32). In such cases the creditor may determine repayment ability using the assumptions provided in § 226.34(a)(4)(iv).

5. *Repayment ability as of consummation.* Section 226.34(a)(4) prohibits a creditor from disregarding repayment ability based on the facts and circumstances known to the creditor as of consummation. In general, a creditor does not violate this provision if a consumer defaults because of a significant reduction in income (for example, a job loss) or a significant obligation (for example, an obligation arising from a major medical expense) that occurs after consummation. However, if a creditor has knowledge as of consummation of reductions in income, for example, if a consumer's written application states that the consumer plans to retire within twelve months without obtaining new employment, or states that the consumer will transition from full-time to part-time employment, the creditor must consider that information.

6. *Income, assets, and employment.* Any current or reasonably expected assets or income may be considered by the creditor, except the collateral itself. For example, a creditor may use information about current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income could include interest or dividends; retirement benefits; public assistance; and alimony, child support, or separate maintenance payments. A creditor may also take into account assets such as savings accounts or investments that the consumer can or will be able to use.

7. *Interaction with Regulation B.* Section 226.34(a)(4) does not require or permit the creditor to make inquiries or verifications that would be prohibited by Regulation B, 12 CFR part 202.

34(a)(4)(i) Mortgage-related obligations.

1. *Mortgage-related obligations.* A creditor must include in its repayment ability analysis the expected property taxes and premiums for mortgage-related insurance required by the creditor as set forth in § 226.35(b)(3)(i), as well as similar mortgage-related expenses. Similar mortgage-related expenses include homeowners' association dues and condominium or cooperative fees.

34(a)(4)(ii) Verification of repayment ability.

1. *Income and assets relied on.* A creditor must verify the income and assets the creditor relies on to evaluate the consumer's repayment ability. For example, if a consumer earns a salary and also states that he or she is paid an annual bonus, but the creditor only relies on the applicant's salary to evaluate repayment ability, the creditor need only verify the salary.

2. *Income and assets—co-applicant.* If two persons jointly apply for credit and both list income or assets on the application, the creditor must verify repayment ability with respect to both applicants unless the creditor relies only on the income or assets of one of the applicants in determining repayment ability.

3. *Expected income.* If a creditor relies on expected income, the expectation must be reasonable and it must be verified with third-party documents that provide reasonably reliable evidence of the consumer's expected income. For example, if the creditor relies on an expectation that a consumer will receive an annual bonus, the creditor may verify the basis for that expectation with documents that show the consumer's past annual bonuses and the expected bonus must bear a reasonable relationship to past bonuses. Similarly, if the creditor relies on a consumer's expected salary following the consumer's receipt of an educational degree, the creditor may verify that expectation with a written statement from an employer indicating that the consumer will be employed upon graduation at a specified salary.

Paragraph 34(a)(4)(ii)(A).

1. *Internal Revenue Service (IRS) Form W–2.* A creditor may verify a consumer's income using a consumer's IRS Form W–2 (or any subsequent revisions or similar IRS Forms used for reporting wages and tax withholding). The creditor may also use an electronic retrieval service for obtaining the consumer's W–2 information.

2. *Tax returns.* A creditor may verify a consumer's income or assets using the consumer's tax return. A creditor may also use IRS Form 4506 ''Request for Copy of Tax Return,'' Form 4506–T ''Request for Transcript of Tax Return,'' or Form 8821

''Tax Information Authorization'' (or any subsequent revisions or similar IRS Forms appropriate for obtaining tax return information directly from the IRS) to verify the consumer's income or assets. The creditor may also use an electronic retrieval service for obtaining tax return information.

3. *Other third-party documents that provide reasonably reliable evidence of consumer's income or assets.* Creditors may verify income and assets using documents produced by third parties. Creditors may not rely on information provided orally by third parties, but may rely on correspondence from the third party, such as by letter or e-mail. The creditor may rely on any third-party document that provides reasonably reliable evidence of the consumer's income or assets. For example, creditors may verify the consumer's income using receipts from a check-cashing or remittance service, or by obtaining a written statement from the consumer's employer that states the consumer's income.

4. *Information specific to the consumer.* Creditors must verify a consumer's income or assets using information that is specific to the individual consumer. Creditors may use third-party databases that contain individual-specific data about a consumer's income or assets, such as a third-party database service used by the consumer's employer for the purpose of centralizing income verification requests, so long as the information is reasonably current and accurate. Information about average incomes for the consumer's occupation in the consumer's geographic location or information about average incomes paid by the consumer's employer, however, would not be specific to the individual consumer.

5. *Duplicative collection of documentation.* A creditor that has made a loan to a consumer and is refinancing or extending new credit to the same consumer need not collect from the consumer a document the creditor previously obtained if the creditor has no information that would reasonably lead the creditor to believe that document has changed since it was initially collected. For example, if the creditor has obtained the consumer's 2006 tax return to make a home purchase loan in May 2007, the creditor may rely on the 2006 tax return if the creditor makes a home equity loan to the same consumer in August 2007. Similarly, if the creditor has obtained the consumer's bank statement for May 2007 in making the first loan, the creditor may rely on that bank statement for that month in making the subsequent loan in August 2007.

Paragraph 34(a)(4)(ii)(B).

1. *No violation if income or assets relied on not materially greater than verifiable amounts.* A creditor that does not verify income or assets used to determine repayment ability with reasonably reliable third-party documents does not violate § 226.34(a)(4)(ii) if the creditor demonstrates that the income or assets it relied upon were not materially greater than the amounts that the creditor would have been able to verify pursuant to § 226.34(a)(4)(ii). For example, if a creditor determines a consumer's repayment ability by relying on the consumer's annual income of $40,000 but fails to obtain documentation of that amount before extending the credit, the creditor will not have violated this section if the creditor later obtains evidence that would satisfy § 226.34(a)(4)(ii)(A), such as tax return information, showing that the creditor could have documented, at the time the loan was consummated, that the consumer had an annual income not materially less than $40,000.

2. *Materially greater than.* Amounts of income or assets relied on are not materially greater than amounts that could have been verified at consummation if relying on the verifiable amounts would not have altered a reasonable creditor's decision to extend credit or the terms of the credit.

Paragraph 34(a)(4)(ii)(C).

1. *In general.* A credit report may be used to verify current obligations. A credit report, however, might not reflect an obligation that a consumer has listed on an application. The creditor is responsible for considering such an obligation, but the creditor is not required to independently verify the obligation. Similarly, a creditor is responsible for considering certain obligations undertaken just before or at consummation of the transaction and secured by the same dwelling that secures the transaction (for example, a ''piggy back'' loan), of which the creditor knows, even if not reflected on a credit report. *See* comment 34(a)(4)–3.

34(a)(4)(iii) Presumption of compliance.

1. *In general.* A creditor is presumed to have complied with § 226.34(a)(4) if the creditor follows the three underwriting procedures specified in paragraph 34(a)(4)(iii) for verifying repayment ability, determining the payment obligation, and measuring the relationship of obligations to income. The procedures for verifying repayment ability are required under paragraph 34(a)(4)(ii); the other procedures are not required but, if followed along with the required procedures, create a presumption that the creditor has complied with § 226.34(a)(4). The consumer may rebut the presumption with evidence that the creditor nonetheless disregarded repayment ability despite following these procedures. For example, evidence of a very high debt-to-income ratio and a very limited residual income could be sufficient to rebut the presumption, depending on all of the facts and circumstances. If a creditor fails to follow one of the non-required procedures set forth in paragraph 34(a)(4)(iii), then the creditor's compliance is determined based on all of the facts and circumstances without there being a presumption of either compliance or violation.

Paragraph 34(a)(4)(iii)(B).

1. *Determination of payment schedule.* To retain a presumption of compliance under § 226.34(a)(4)(iii), a creditor must determine the consumer's ability to pay the principal and interest obligation based on the maximum scheduled payment in the first seven years following consummation. In general, a creditor should determine a payment schedule for purposes of § 226.34(a)(4)(iii)(B) based on the guidance in the staff commentary to § 226.17(c)(1). Examples of how to determine the maximum scheduled payment in the first seven years are provided as follows (all payment amounts are rounded):

i. *Balloon-payment loan; fixed interest rate.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 7-year term but is amortized over 30 years. The monthly payment scheduled for 7 years is $733 with a balloon payment of remaining principal due at the end of 7 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $733.

ii. *Fixed-rate loan with interest-only payment for five years.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 30-year term. The monthly payment of $667 scheduled for the first 5 years would cover only the interest due. After the fifth year, the scheduled payment would increase to $772, an amount that fully amortizes the principal balance over the remaining 25 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $772.

iii. *Fixed-rate loan with interest-only payment for seven years.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 30-year term. The monthly payment of $667 scheduled for the first 7 years would cover only the interest due. After the seventh year, the scheduled payment would increase to $793, an amount that fully amortizes the principal balance over the remaining 23 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the interest-only payment of $667.

iv. *Variable-rate loan with discount for five years.* A loan in an amount of $100,000 has a 30-year term. The loan agreement provides for a fixed interest rate of 7.0 percent for an initial period of 5 years. Accordingly, the payment scheduled for the first 5 years is $665. The agreement provides that, after 5 years, the interest rate will adjust each year based on a specified index and margin. As of consummation, the sum of the index value and margin (the fully-indexed rate) is 8.0 percent. Accordingly, the payment scheduled for the remaining 25 years is $727. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $727.

v. *Variable-rate loan with discount for seven years.* A loan in an amount of $100,000 has a 30-year term. The loan agreement provides for a fixed interest rate of 7.125 percent for an initial period of 7 years. Accordingly, the payment scheduled for the first 7 years is $674. After 7 years, the agreement provides that the interest rate will adjust each year based on a specified index and margin. As of consummation, the sum of the index value and margin (the fully-indexed rate) is 8.0 percent. Accordingly, the payment scheduled for the remaining years is $725. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $674.

vi. *Step-rate loan.* A loan in an amount of $100,000 has a 30-year term. The agreement provides that the interest rate will be 5 percent for two years, 6 percent for three years, and 7 percent thereafter. Accordingly, the payment amounts are $537 for two years, $597 for three years, and $654 thereafter. To retain the presumption of compliance, the creditor must assess repayment ability based on the payment of $654.

Paragraph 34(a)(4)(iii)(C).

1. *''Income'' and ''debt''.* To determine whether to classify particular inflows or obligations as ''income'' or ''debt,'' creditors may look to widely accepted governmental and non-governmental underwriting standards, including, for example, those set forth in the Federal Housing Administration's handbook on Mortgage Credit Analysis for Mortgage Insurance on One- to Four-Unit Mortgage Loans.

34(a)(4)(iv) Exclusions from the presumption of compliance.

1. *In general.* The exclusions from the presumption of compliance should be interpreted consistent with staff comments 32(d)(1)(i)–1 and 32(d)(2)–1.

2. *Renewable balloon loan.* If a creditor is unconditionally obligated to renew a balloon-payment loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control), the full term resulting from such renewal is the relevant term for purposes of the exclusion of certain balloon-payment loans. See comment 17(c)(1)–11 for a discussion of conditions within a consumer's control in connection with renewable balloon-payment loans.

* * * * *

■ 21. In Supplement I to Part 226, a new *Section 226.35—Prohibited Acts or Practices in Connection with Higher-priced Mortgage Loans* is added to read as follows:

Section 226.35—Prohibited Acts or Practices in Connection With Higher-priced Mortgage Loans

35(a) *Higher-priced mortgage loans.*

Paragraph 35(a)(2).

1. *Average prime offer rate.* Average prime offer rates are annual percentage rates derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. Other pricing terms include commonly used indices, margins, and initial fixed-rate periods for variable-rate transactions. Relevant pricing characteristics include a consumer's credit history and transaction characteristics such as the loan-to-value ratio, owner-occupant status, and purpose of the transaction. To obtain average prime offer rates, the Board uses a survey of creditors that both meets the criteria of § 226.35(a)(2) and provides pricing terms for at least two types of variable-rate transactions and at least two types of non-variable-rate transactions. An example of such a survey is the Freddie Mac Primary Mortgage Market Survey®.

2. *Comparable transaction.* A higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by the specified margin. The table of average prime offer rates published by the Board indicates how to identify the comparable transaction.

3. *Rate set.* A transaction's annual percentage rate is compared to the average prime offer rate as of the date the transaction's interest rate is set (or ''locked'') before consummation. Sometimes a creditor sets the interest rate initially and then re-sets it at a different level before consummation. The creditor should use the last date the interest rate is set before consummation.

4. *Board table.* The Board publishes on the Internet, in table form, average prime offer rates for a wide variety of transaction types. The Board calculates an annual percentage rate, consistent with Regulation Z (see § 226.22 and appendix J), for each transaction type for which pricing terms are available from a survey. The Board estimates annual percentage rates for other types of transactions for which direct survey data are not available based on the loan pricing terms available in the survey and other information. The Board publishes on the Internet the methodology it uses to arrive at these estimates.

35(b) Rules for higher-priced mortgage loans.

1. *Effective date.* For guidance on the applicability of the rules in § 226.35(b), see comment 1(d)(5)–1.

Paragraph 35(b)(2)(ii)(C).

1. *Payment change.* Section 226.35(b)(2) provides that a loan subject to this section may not have a penalty described by § 226.32(d)(6) unless certain conditions are met. Section 226.35(b)(2)(ii)(C) lists as a condition that the amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation. For examples showing whether a prepayment penalty is permitted or prohibited in connection with particular payment changes, see comment 32(d)(7)(iv)–1. Those examples, however, include a condition that § 226.35(b)(2) does not include: the condition that, at consummation, the consumer's total monthly debt payments may not exceed 50 percent of the consumer's monthly gross income. For guidance about circumstances in which payment changes are not considered payment changes for purposes of this section, see comment 32(d)(7)(iv)–2.

2. *Negative amortization.* Section 226.32(d)(2) provides that a loan described in § 226.32(a) may not have a payment schedule with regular periodic payments that cause the principal balance to increase. Therefore, the commentary to § 226.32(d)(7)(iv) does not include examples of payment changes in connection with negative amortization. The following examples show whether, under § 226.35(b)(2), prepayment penalties are permitted or prohibited in connection with particular payment changes, when a loan agreement permits negative amortization:

i. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month and the loan agreement permits negative amortization to occur. Under the loan agreement, the first date that a scheduled payment in a different amount may be due is January 1, 2014 and the creditor does not have the right to change scheduled payments prior to that date even if negative amortization occurs. A prepayment penalty is permitted with this mortgage transaction provided that the other § 226.35(b)(2) conditions are met, that is: provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before December 31, 2011, and the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate.

ii. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month and the loan agreement permits negative amortization to occur. Under the loan agreement, the first date that a scheduled payment in a different amount may be due is January 1, 2014, but the creditor has the right to change scheduled payments prior to that date if negative amortization occurs. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

35(b)(3) Escrows.

Paragraph 35(b)(3)(i).

1. Section 226.35(b)(3) applies to principal dwellings, including structures that are classified as personal property under state law. For example, an escrow account must be established on a higher-priced mortgage loan secured by a first-lien on a mobile home, boat or a trailer used as the consumer's principal dwelling. *See* the commentary under §§ 226.2(a)(19), 226.2(a)(24), 226.15 and 226.23. Section 226.35(b)(3) also applies to higher-priced mortgage loans secured by a first lien on a condominium or a cooperative unit if it is in fact used as principal residence.

2. *Administration of escrow accounts.* Section 226.35(b)(3) requires creditors to establish before the consummation of a loan secured by a first lien on a principal dwelling an escrow account for payment of property taxes and premiums for mortgage-related insurance required by creditor. Section 6 of RESPA, 12 U.S.C. 2605, and Regulation X address how escrow accounts must be administered.

3. *Optional insurance items.* Section 226.35(b)(3) does not require that escrow accounts be established for premiums for mortgage-related insurance that the creditor does not require in connection with the credit transaction, such as an earthquake insurance or debt-protection insurance.

Paragraph 35(b)(3)(ii)(B).

1. *Limited exception.* A creditor is required to escrow for payment of property taxes for all first lien loans secured by condominium units regardless of whether the creditors escrows insurance premiums for condominium unit.

■ 22. In Supplement I to Part 226, a new *Section 226.36—Prohibited Acts or Practices in Connection with Credit Secured by a Consumer's Principal Dwelling* is added to read as follows:

Section 226.36—Prohibited Acts or Practices in Connection With Credit Secured by a Consumer's Principal Dwelling

1. *Effective date.* For guidance on the applicability of the rules in § 226.36, see comment 1(d)(5)–1.

36(a) Mortgage broker defined.

1. *Meaning of mortgage broker.* Section 226.36(a) provides that a mortgage broker is any person who for compensation or other monetary gain arranges, negotiates, or otherwise obtains an extension of consumer credit for another person, but is not an employee of a creditor. In addition, this definition expressly includes any person that satisfies this definition but makes use of ''table funding.'' Table funding occurs when a transaction is consummated with the debt obligation initially payable by its terms to one person, but another person provides the funds for the transaction at consummation and receives an immediate assignment of the note, loan contract, or other evidence of the debt obligation. Although § 226.2(a)(17)(1)(B) provides that a person to whom a debt obligation is initially payable on its face generally is a creditor, § 226.36(a) provides that, solely for the purposes of § 226.36, such a person is considered a mortgage broker. In addition, although consumers themselves often arrange, negotiate, or otherwise obtain extensions of consumer credit on their own behalf, they do not do so for compensation or other monetary gain or for another person and, therefore, are not mortgage brokers under this section.

36(b) Misrepresentation of value of consumer's principal dwelling.

36(b)(2) When extension of credit prohibited.

1. *Reasonable diligence.* A creditor will be deemed to have acted with reasonable diligence under § 226.36(b)(2) if the creditor extends credit based on an appraisal other than the one subject to the restriction in § 226.36(b)(2).

2. *Material misstatement or misrepresentation.* Section 226.36(b)(2) prohibits a creditor who knows of a violation of § 226.36(b)(1) in connection with an appraisal from extending credit based on such appraisal, unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of such dwelling. A misstatement or misrepresentation of such dwelling's value is not material if it does not affect the credit decision or the terms on which credit is extended.

36(c) Servicing practices.

Paragraph 36(c)(1)(i).

1. *Crediting of payments.* Under § 226.36(c)(1)(i), a mortgage servicer must credit a payment to a consumer's loan account as of the date of receipt. This does not require that a mortgage servicer post the payment to the consumer's loan account on a particular date; the servicer is only required to credit the payment *as of* the date of receipt. Accordingly, a servicer that receives a payment on or before its due date (or within any grace period), and does not enter the payment on its books or in its system until after the payment's due date (or expiration of any grace period), does not violate this rule as long as the entry does not result in the imposition of a late charge, additional interest, or similar penalty to the consumer, or in the reporting of negative information to a consumer reporting agency.

2. *Payments to be credited.* Payments should be credited based on the legal obligation between the creditor and consumer. The legal obligation is determined by applicable state or other law.

3. *Date of receipt.* The ''date of receipt'' is the date that the payment instrument or other means of payment reaches the mortgage servicer. For example, payment by check is received when the mortgage servicer receives it, not when the funds are collected. If the consumer elects to have payment made by a third-party payor such as a financial institution, through a preauthorized payment or telephone bill-payment arrangement, payment is received when the mortgage servicer receives the third-party payor's check or other transfer medium, such as an electronic fund transfer.

Paragraph 36(c)(1)(ii).

1. *Pyramiding of late fees.* The prohibition on pyramiding of late fees in this subsection should be construed consistently with the ''credit practices rule'' of Regulation AA, 12 CFR 227.15.

Paragraph 36(c)(1)(iii).

1. *Reasonable time.* The payoff statement must be provided to the consumer, or person acting on behalf of the consumer, within a reasonable time after the request. For example, it would be reasonable under most circumstances to provide the statement within five business days of receipt of a consumer's request. This time frame might be longer, for example, when the servicer is experiencing an unusually high volume of refinancing requests.

2. *Person acting on behalf of the consumer.* For purposes of § 226.36(c)(1)(iii), a person acting on behalf of the consumer may include the consumer's representative, such as an attorney representing the individual, a non-profit consumer counseling or similar organization, or a creditor with which the consumer is refinancing and which requires the payoff statement to complete the refinancing. A servicer may take reasonable measures to verify the identity of any person acting on behalf of the consumer and to obtain the consumer's authorization to release information to any such person before the ''reasonable time'' period begins to run.

3. *Payment requirements.* The servicer may specify reasonable requirements for making payoff requests, such as requiring requests to be in writing and directed to a mailing address, e-mail address or fax number specified by the servicer or orally to a telephone number specified by the servicer, or any other reasonable requirement or method. If the consumer does not follow these requirements, a longer time frame for responding to the request would be reasonable.

4. *Accuracy of payoff statements.* Payoff statements must be accurate when issued.

Paragraph 36(c)(2).

1. *Payment requirements.* The servicer may specify reasonable requirements for making payments in writing, such as requiring that payments be accompanied by the account number or payment coupon; setting a cut-off hour for payment to be received, or setting different hours for payment by mail and payments made in person; specifying that only checks or money orders should be sent by mail; specifying that payment is to be made in U.S. dollars; or specifying one particular address for receiving payments, such as a post office box. The servicer may be prohibited, however, from requiring payment solely by preauthorized electronic fund transfer. (*See* section 913 of the Electronic Fund Transfer Act, 15 U.S.C. 1693k.)

2. *Payment requirements—limitations.* Requirements for making payments must be reasonable; it should not be difficult for most consumers to make conforming payments. For example, it would be reasonable to require a cut-off time of 5 p.m. for receipt of a mailed check at the location specified by the servicer for receipt of such check.

3. *Implied guidelines for payments.* In the absence of specified requirements for making payments, payments may be made at any location where the servicer conducts business; any time during the servicer's normal business hours; and by cash, money order, draft, or other similar instrument in properly negotiable form, or by electronic fund transfer if the servicer and consumer have so agreed.

By order of the Board of Governors of the Federal Reserve System, July 15, 2008.

Jennifer J. Johnson,

Secretary of the Board.

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REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 3403/P.L. 110–283

New and Emerging Technologies 911 Improvement Act of 2008 (July 23, 2008; 122 Stat. 2620)

H.R. 3712/P.L. 110–284

To designate the United States courthouse located at 1716 Spielbusch Avenue in Toledo, Ohio, as the ''James M. Ashley and Thomas W.L. Ashley United States Courthouse''. (July 23, 2008; 122 Stat. 2627)

Last List July 24, 2008

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